

ORAL HISTORY INTERVIEWS

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.....	18
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“... OCAP don’t mean anything in wet years and dry years because the whole purpose of OCAP is to restrict the amount of Truckee River water that gets diverted. ... during dry years there’s not enough water ... The limitation is the physical resource. And in wet years ... Lahontan is spilling so they’re not diverting Truckee River water. ...”	119
“... beginning about ‘98-, ‘99, 2000 they really began to enforce the OCAP ... for the first time really, T-C-I-D has been forced to pay attention and to comply with the Bureau of Reclamation’s directions. Previously they would enter into contracts and they would ignore them, and the OCAP they would ignore. And that’s been part of the problem, they were a law unto themselves ... and were amazed ... when Congress, and particularly the Nevada congressional delegation quote betrayed [unquote] them by supporting the Settlement ...”	119
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Introduction

In 1988, Reclamation began to create a history program. While headquartered in Denver, the history program was developed as a bureau-wide program.

One component of Reclamation's history program is its oral history activity. The primary objectives of Reclamation's oral history activities are: preservation of historical data not normally available through Reclamation records (supplementing already available data on the whole range of Reclamation's history); making the preserved data available to researchers inside and outside Reclamation.

In the case of the Newlands Project, the senior historian consulted the regional director to design a special research project to take an all around look at one Reclamation project. The regional director suggested the Newlands Project, and the research program occurred between 1994 and signing of the Truckee River Operating Agreement in 2008. Professor Donald B. Seney of the Government Department at California State University - Sacramento (now emeritus and living in South Lake Tahoe, California) undertook this work. The Newlands Project, while a small- to medium-sized Reclamation project, represents a microcosm of issues found throughout Reclamation:

- water transportation over great distances;
 - limited water resources in an urbanizing area;
 - three Native American groups with sometimes conflicting interests;
 - private entities with competitive and sometimes misunderstood water rights;
 - many local governments with growing urban areas and water needs;
 - Fish and Wildlife Service programs competing for water for endangered species in Pyramid Lake and for viability of the Stillwater National Wildlife Refuge to the east of Fallon, Nevada;
 - and, Reclamation's original water user, the Truckee-Carson Irrigation District.
- Reclamation manages limited water resources in a complex political climate while dealing with modern competition for some of the water supply that originally flowed to farms and ranches on its project.

A note on the nature of oral histories is in order for readers and researchers who have not worked with oral histories in the past. We attempt to process Reclamation's oral histories so that speech patterns and verbiage are preserved. Speech and formal written text vary greatly in most individuals, and we do not attempt to turn Reclamation's oral histories into polished formal discourse. Rather, the objective during editing of interviews is to convey the information as it was spoken during the interview. However, editorial changes often are made to clarify or expand meaning, and those are generally shown in the text.

The senior historian of the Bureau of Reclamation developed and directs the oral history program. Questions, comments, and suggestions may be addressed to the senior historian.

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www.usbr.gov/history

Oral History Interviews
Robert S. Pelcyger

Seney: My name is Donald Seney, and I'm with Robert S. Pelcyger in his office in Boulder, Colorado. Today is September 27, 1995. [This is our first session and this is tape number one]¹. Good morning, Bob.

Pelcyger: Hi, Don.

Family, Early Life and Education

Seney: Why don't you just begin by telling me a little bit about where you were born and when you were born, just briefly about your early life and your education.

Born in Brooklyn, New York

Raised in Brooklyn and Valley Stream, Long Island

Pelcyger: I was born in 1941 in Brooklyn, New York.

Seney: Why don't you give me the day and month too.

Pelcyger: December 15, 1941. I lived in Brooklyn until I was eleven, moved out to a town called Valley Stream on Long Island, [in] 1952.

Studied Philosophy at the University of Rochester in New York

Went to high school there. And then I went to the University of Rochester as an undergraduate, in Rochester, New York, and majored in philosophy.

1. A note on editorial conventions. In the text of these interviews, information in parentheses, (), is actually on the tape. Information in brackets, [], has been added to the tape either by the editors to clarify meaning or at the request of the interviewee in order to correct, enlarge, or clarify the interview as it was originally spoken. Words have sometimes been struck out by editors or interviewee in order to clarify meaning or eliminate repetition. In the case of strikeouts, that material has been printed at 50% density to aid in reading the interviews but assuring that the struckout material is readable.

The transcriber and editors also have removed some extraneous words such as false starts and repetitions without indicating their removal. The meaning of the interview has not been changed by this editing.

In an effort to conform to standard academic rules of usage (see *The Chicago Manual of Style*), individual's titles are only capitalized in the text when they are specifically used as a title connected to a name, e.g., "Secretary of the Interior Gale Norton" as opposed to "Gale Norton, the secretary of the interior;" or "Commissioner John Keys" as opposed to "the commissioner, who was John Keys at the time." Likewise formal titles of acts and offices are capitalized but abbreviated usages are not, e.g., Division of Planning as opposed to "planning;" the Reclamation Projects Authorization and Adjustment Act of 1992, as opposed to "the 1992 act."

The convention with acronyms is that if they are pronounced as a word then they are treated as if they are a word. If they are spelled out by the speaker then they have a hyphen between each letter. An example is the Agency for International Development's acronym: said as a word, it appears as AID but spelled out it appears as A-I-D; another example is the acronym for State Historic Preservation Officer: SHPO when said as a word, but S-H-P-O when spelled out.

Attended Yale Law School

And then I went to Yale Law School.

Seney: How did you get west and begin practicing law here in Boulder?

Pelcyger: Well, it was all a series of accidents. (chuckles)

Seney: That's life, isn't it?

Upon Graduation Spent a Year in England on a Fulbright Scholarship

Pelcyger: Right. [comment about microphone] After I graduated from Yale, I went on a Fulbright [Scholarship] for a year to England, and really had very little idea of what I wanted to do. I knew a lot of things I *didn't* want to do, but I didn't know what I wanted to do.

A Call from a Friend Resulted in Him Ending up on the Navajo Reservation for a Few Months on His Return from England

While I was in England, I got a call from a friend of mine who had graduated with me from law school, and he said he had been traveling around the country, and he ran into somebody I knew *of*, I really didn't know. ~~somebody who graduated.~~² He was teaching at UCLA [University of California, Los Angeles] Law School, he graduated Yale two years ahead of me. ~~and I knew of him, I really didn't know him.~~³ And he had gotten involved first as an academician, and then in a practical way, with Indian law. That was the time when what we called OEO Legal Service, Office of Economic Opportunity Legal Services, the predecessor to the current Legal Services Corporation, was just getting started in 1967. So my friend called me, and he had run into this academician, and my friend said that he thought that might be something that I might be interested in. So I contacted him, and he arranged for me first to go to the Navajo Reservation, after I got back from England, which I did. That was a temporary job that lasted about five or six months.

Seney: Let me ask you, what was your impression, a Brooklyn, Long Island boy, coming out to the West? Was this your first trip west ever?

Pelcyger: No, I had taken a cross-country trip in a car with a friend, during the summer between my junior and senior years of college.

Seney: Do you remember your impression of that Navajo Reservation then?

“ . . . I remember going from . . . New York to London, England . . . going from, I

2. Clarification provided by Mr. Pelcyger.

3. Clarification provided by Mr. Pelcyger.

don't know, the twentieth to the nineteenth century, and then going from there to the Navajo Reservation, which was sort of the sixteenth century, and then to Los Angeles, which was the twenty-first . . ."

Pelcyger: Well, I remember going from the East Coast and New York, going from New York to London, England, spending a year in London, sort of going from, I don't know, the twentieth to the nineteenth century, and then going from there to the Navajo Reservation, which was sort of the sixteenth century, and then to Los Angeles, which was the twenty-first—all in a pretty compressed period of time.

He Felt Comfortable on the Navajo Reservation, but His Wife Wasn't

But I felt comfortable on the Navajo Reservation. It was difficult for us, because I had a year-old daughter, and my wife at that time was from New York, and she didn't fall in love with the Navajo Reservation, and there was not much for her to do there, especially with the young daughter—but it was temporary. But it was an eye-opening experience, and certainly not what I had been used to.

Seney: But it must have drawn you into the idea of working on Indian rights.

“ . . . when I graduated law school I not only had never taken Indian law or water law, which I guess are the two areas that I've come to specialize in, but I didn't even know those areas existed as subjects. . . .”

Pelcyger: Yeah, and especially, I think people who I enjoyed and seem to have a natural affinity for, and the law was fascinating to me. I gotta say, when I graduated law school I not only had never taken Indian law or water law, which I guess are the two areas that I've come to specialize in, but I didn't even know those areas existed as subjects. I had not even considered the possibility of what law applies to Indians—I never even thought about that.

“ . . . I went to Los Angeles, where I basically worked out of UCLA Law School and provided legal services to small Indian tribes in Southern California. I was probably at UCLA I think for about two years, and then set up an office in Escondido, California . . .”

And then after I was on the Navajo Reservation for five or six months, I went to Los Angeles, where I basically worked out of UCLA Law School and provided legal services to small Indian tribes in Southern California. I was probably at UCLA I think for about two years, and then set up an office in Escondido, California, which is about thirty miles north of San Diego.

“There are quite a few Indian reservations in Southern California—they are small . . .”

There are quite a few Indian reservations in Southern California—they are small, but there are quite a few of them.

Introduction to Indian Water Law

It was in that period that I first got introduced to water law. One of the spokespersons from a reservation on the San Luis Rey River in Southern California came up to me and she had in her hand a copy of a 1914 contract that was entered into between the Secretary of the Interior and a local water company, which had to do with her reservation. She said, "You're a lawyer, tell me what this means." And it had terms in it like "acre feet" and "cubic feet per second," which are terms that apply to water, and of course I had no idea what they meant. That was my introduction to water law.

Seney: I guess practicing law amongst the Indians and practicing water law go hand-in-hand.

The Winters Doctrine and Indian Water Rights in the West

Pelcyger: Yes, water is probably the most precious resource of *most* Indian reservations, and it's very scarce, of course, in the West.

"... the time that I began practicing, the late 1960s, was ... a period of awakening of Indian tribes to both their sovereignty and also their resources, and especially their water rights ..."

"... their water rights were predicated on a 1908 Supreme Court decision called *Winters v. United States*. But although the Supreme Court had decided the case in 1908, it had really been for the most part dormant doctrine, and most of the development that took place in the West was not consistent with the Indian water rights that had been enunciated by the Supreme Court. ..."

It happened that the time that I began practicing, the late 1960s, was a period when I think partly through the War on Poverty and it was a period of awakening of Indian tribes to both their sovereignty and also their resources, and especially their water rights, because their water rights were predicated on a 1908 Supreme Court decision called *Winters v. United States*. But although the Supreme Court [had] decided the case in 1908, it had really been for the most part dormant doctrine, and most of the development that took place in the West was not consistent with the Indian water rights that had been enunciated by the Supreme Court.

"... many tribes ... were beginning to realize that ... they had major claims to a very valuable resource. ..."

And many tribes at that time were beginning to realize that, and beginning to realize that their water rights had not been respected, and that they had major claims [to] a very valuable resource.

Seney: You know, the Winters Doctrine is a central doctrine, as you say, to this. Could you summarize it a little for us, and tell us what the court said that's important

there?

The Winters Doctrine in the Context of Western Water Rights

Pelcyger: I think in order to understand the Winters Doctrine, you have to put it in context of other kinds of water rights in the West. The predominant doctrine under which water rights are defined in the West is the law of prior appropriation, which is adopted in most of the western states. The law of prior appropriation encourages people to divert water from streams and put it to use. The slogan that best epitomizes the prior appropriation doctrine is “first in time, first in right.” The first person that diverts water, obtains a prior right to it, so that in times of shortage, which is frequent in the West, that person gets his or her water before anybody else does. So the essential ingredients of the prior appropriation doctrine are putting water to use, and then the priority attaches as of the time you put the water to use, vis-à-vis other water users.

The Winters Doctrine Does Not Follow Traditional Western Water Law

The Winters Doctrine is different. In the *Winters* case, the Supreme Court held that when an Indian reservation was created as a result of a treaty or agreement or a statute, or an executive order, even though there was no specific mention of water in the document that established the reservation, nevertheless water was reserved at that time to fulfill the purpose of the reservation. So under the Winters Doctrine, the water right doesn't depend on water being put to use, it depends on the establishment of the reservation.

“ . . . the priority attaches from time immemorial, and or the date of the establishment of the reservation . . . ”

And the priority attaches from [time immemorial, and or] the date of the establishment of the reservation, which in the case of most Indian reservations typically is, of course, very early, because the pattern in the West was that Indians entered into treaties which they gave up large areas of their aboriginal lands and agreed to settle on smaller reservations, ceded the remainder of their lands to the Federal government, which made possible the settlement of those areas that were ceded. So the reservations were created first, before most areas of the West were settled, and so the Indian tribes would have the prior water right. And it's not dependent upon their putting it [the water] to use. And it's [the amount of the right is measured by [what is necessary to] fulfilling the purpose of the reservation.

Seney: That's what I was going to ask you: How do you tell how much is reserved to the reservation?

The Quantity of the Reserved Water Rights Is Still a Major Issue

Pelcyger: Well, that's still an issue, but in the *Winters* case, the issue concerned irrigation, and the Supreme Court held the whole concept of establishing reservations in the arid West, when the Indians gave up these large tracts of land on which they

roamed freely and on which they utilized the resources, the concept was for them to settle in a much smaller area. And of course if they were going to settle in a smaller area on the reservation, they needed to use the land much more intensively, and agriculture was always mentioned in the treaties, or was part of the policy at the time, to convert the nomadic Indians, the hunters and wanderers and food-gatherers, into agricultural-pastoral people. And so the Supreme Court said, well, obviously, you wouldn't be able to accomplish that unless water was reserved, because in the arid West, land by itself was not sufficient, you needed to have water. And so the Winters Doctrine arose out of cases involving agriculture.

In *Arizona vs. California* the Supreme Court Declared Reservation Reserved Rights Were for “Practically Irrigable” Acreage on the Reservation

And it really wasn't until 1963 the Supreme Court case of *Arizona v. California*, where the Supreme Court held that the Winters Doctrine right for agriculture was quantified under a test that was called “practically irrigable” acreage. And that test depends upon a determination of how much land within the reservation is irrigable—economically irrigable, or irrigable in a way that is economically feasible. And then how much water is necessary to serve that acreage. So that's not the only test, but that's the area where it's been defined. This is where we get into Pyramid Lake Paiute Tribe—where the purpose of the reservation was something other than, or in addition to agriculture, like fish would need water for fish purposes, or purposes other than agriculture. That area is less well-defined.

Ford Foundation Sponsors California Indian Legal Services, His Public Interest Law Firm Devoted to Indian Law

Did you want me to continue and tell you how I got to Boulder?

Seney: Yes, right. That's okay, in these conversations we'll kind of take side trips as we need to. You were starting to say now you were beginning to get involved in water rights for the first time.

Pelcyger: Right. And what happened was that we'd established this office in Southern California, and that was the time of the late 1960s, and we were contacted by the Ford Foundation. The Ford Foundation had been actively involved in establishing national nonprofit law firms to benefit minorities. Of course the first venture was with the NAACP [National Association for the Advancement of Colored People] Legal Defense and Education Fund which achieved many successes and was very well known. And then prior to them contacting us, the Ford Foundation had been involved with the establishment of the Mexican-American Legal Defense and Education Fund [MALDEF]. And somebody in the Foundation decided that it would be a good idea to do something similar for Indians. And so they hired a consultant and the consultant went around the country interviewing different people. The purpose was to make a report to the Ford Foundation about what a national nonprofit law firm for Indians would look like. To make a long story short, he contacted us and before he had contacted us, he really hadn't focused on Indian law as being a separate and distinct area. He had more or less thought of

Indian people as having the same kinds of problems, because they were poor, as most other disadvantaged or poor groups. That is, they had problems with welfare and discrimination and education and those kinds of things. And we talked to him and said, "Well, while that's true, there's a whole other area of law which is unique to Indians." And our recommendation was if there was going to be a national law firm, that they not try to duplicate the same areas that these other firms were working on, working in welfare and employment discrimination and housing and education and those kinds of issues more typically associated with poor people. But if you were going to do an Indian program, you needed to focus on the issues that were unique to Indians. So they thought that was a good idea, and they had also had problems when they started the Mexican-American program where they said, "Alright, here's two million dollars"—which in those times was a lot of money—plunked it on the table and watched various groups and factions within the Mexican-American community kind of fight over it. So they decided that wasn't a very good idea, and that if they were going to start an Indian program, they should start with an existing program and then expand it, rather than just putting down two million dollars and saying, "Have at it." So they decided to then make a grant to our program.

Seney: This was the UCLA program?

Pelcyger: Well, it was now called California Indian Legal Services. The UCLA operation was an offshoot, it was part of California Indian Legal Services.

“ . . . California Indian Legal Services initially got a pretty small grant to start a national program. . . . ”

And so California Indian Legal Services initially got a pretty small grant to start a national program.

“ . . . a couple of years later we moved to Boulder for a variety of reasons. It was always the intent that we would branch out after a while. But the Pyramid Lake case actually played an important role in the establishment of the Native American Rights Fund . . . ”

Then a couple of years later we moved to Boulder for a variety of reasons. It was always the intent that we would branch out after a while. But the Pyramid Lake case actually played an important role in the establishment of the Native American Rights Fund, which is still here in Boulder.

Suing the Federal Government on Behalf of the Rincon and La Jolla Tribes

As I indicated, I got my feet wet on water law in this small reservation in Southern California. And it actually turned into kind of a *cause célèbre* because I began to look into it and discovered that—I think I made some trips to the archives—and realized that like most—what I subsequently found out—most major Indian issues had a very long history.

“ . . . the United States government, from time-to-time, considered what to do about the problem, and wound up doing nothing. So there was a statute that said that the United States Attorney shall represent Indian tribes . . . one of the things that I did in this case was file a lawsuit on behalf of this tribe, the Rincon Tribe, against the Attorney General of the United States . . . seeking an order compelling the Attorney General to represent the Rincon Tribe with regard to their water rights claims . . . I provided documentation to the court about . . . how many times the government was obviously aware of the situation . . . But they’d never done anything about it. So the judge issued an order directing the Attorney General to do something. . . . ”

The San Luis Rey River in Southern California, the water issues on it were not coming up for the first time in 1969—they had been around for a long time. And throughout that period, the United States government, from time-to-time, considered what to do about the problem, and wound up doing nothing. So there was a statute that said that the United States Attorney shall represent Indian tribes in connection with their claims at law or inequity. And so one of the things that I did in this case was file a lawsuit on behalf of this tribe, the Rincon Tribe, against the Attorney General of the United States, who at that time was John Mitchell in the Nixon administration, seeking an order compelling the Attorney General to represent the Rincon Tribe with regard to their water rights claims, and in connection with that case, [I] provided documentation to the court about all the history of it, and how many times the government was obviously aware of the situation: it had been called to their attention not once, but repeatedly over and over again. But they’d never done anything about it. So the judge issued an order directing the Attorney General to do something. And that achieved, actually, quite a bit of notoriety.

Seney: This had never been done before, I take it.

Pelcyger: No, it hadn’t been done before. This was also happening at a time when these legal services programs for poor people nationwide were very controversial. And I remember watching I think it was *Meet the Press*, and John Mitchell, the Attorney General, was interviewed on *Meet the Press*, and he was asked a question about what the Nixon administration’s position was, on legal services programs. And in his answer, he referred to my *Rincon* case, and he sort of said, “Well, generally, they’re okay, but we don’t like it when courts go around ordering the Attorney General to do things,” because that’s something that’s reserved to his authority and discretion.

Seney: Was that kind of a scary moment for you?

Role of William Veeder in Calling Attention to Indian Law and Rights

Pelcyger: Well, it was scary. I was two or three years out of law school at the time, and I didn’t expect to have the Attorney General know about my little case. But that’s also what led me to Pyramid Lake, because there was a lawyer, pretty well-known in Indian country, with the Bureau of Indian Affairs, named William Veeder. He

had been a lawyer previously at the Justice Department. He was quite a well-known water lawyer *for* the United States and he had gotten into a lot of trouble at the Justice Department, and the Bureau of Indian Affairs hired him. And it's actually in a large part because of him that this awakening of consciousness in Indian country was taking place about tribes' water rights.

Seney: He got in trouble, I take it, because he helped to cause that awakening.

“ . . . he is a very, very strong advocate for Indian tribes. . . . ”

Pelcyger: Yeah. But he also got in trouble because he's a troublemaker (laughter) and he liked to make trouble. But he was viewed, and he is a very, very strong advocate for Indian tribes. And he was making speeches around the country, and he was doing everything he could to spread the word that tribes had these very valuable rights that weren't being respected. And they had legitimate grievances which had gone unanswered for long periods of time.

Met Veeder in Washington, D.C., Working on the *San Luis Rey* Case

So I think—[my] memory is a little bit foggy on this—but I think what happened was, in connection with my *San Luis Rey* case, I went to Washington, and somebody directed me to go see Bill Veeder, so I did, and we spent some time together.

“ . . . I . . . was really scared . . . these water rights are extremely valuable. . . . that was one reason why we sued the United States to . . . represent the tribe, because I knew that the other side would be very well-armed legally, and would have the best possible representation, and I was really frightened that I wasn't up to the task, being so young and being so inexperienced and without even so much as a course, in law school about it. . . . ”

And at that time, again, I was a lawyer who had graduated an eastern law school and didn't know there was a subject called “water law,” and, in fact I was really scared, because these water rights are extremely valuable. In fact, that was one reason why we sued the United States to get the United States to represent the tribe, because I knew that the other side would be very well-armed legally, and would have the best possible representation, and I was really frightened that I wasn't up to the task, being so young and being so inexperienced and without ~~any~~, even so much as a course, in law school about it.

Bill Veeder Liked the Court Decision Forcing the Attorney General to Represent the Interests of Indians in Water Litigation

So I was very anxious to learn as much as I could, as quickly as I could, and Bill Veeder and I initially got along very well, and he became almost a father figure to me, and took me under his wing. When I got that order out of the court in Southern California, directing the Attorney General to do something, he was very, very pleased with that, because he had been trying in his own way, not very effectively,

to bring this matter, bring these kinds of issues all over the country, to get the government to do something about them, and he hadn't been successful. So we got to be pretty good friends, and we communicated frequently, and he wrote quite a bit about these kinds of water issues all over the country.

“ . . . we pointed out to the Ford Foundation . . . that water law was a major issue for Indian tribes, and if they were going to do a nonprofit law firm . . . they really ought to . . . make that a major priority. . . . ”

And that was one of the things that we pointed out to the Ford Foundation, in fact, that water law was a major issue for Indian tribes, and if they were going to do a nonprofit law firm of this kind, they really ought to, among other things, make that a major priority. And the Ford Foundation got very interested and intrigued by that.

The Pyramid Lake Paiute Tribe, President Nixon's Message on Indians, and the Federal Government's Conflict of Interest in Indian Affairs

Veeder, of course, knew quite a bit about Pyramid Lake, and he was in touch with the Pyramid Lake Paiute Tribe's lawyer, and Pyramid Lake Paiute Tribe at that time, like other tribes, was just beginning to expand its consciousness and become aware of *its* issues.

“ . . . Veeder introduced me to the lawyer at the Pyramid Lake Indian Reservation. . . . ”

And so Veeder introduced me to the lawyer at the Pyramid Lake Indian Reservation.

Seney: What was his name?

The Ford Foundation Grant Went to the Native American Rights Fund, and it Stipulated That the Fund Had to Pursue the Pyramid Lake Case

Pelcyger: Well the first lawyer he introduced me to was a guy named Bob Leland, and then shortly after that, Leland either was terminated or left the employment of the tribe, and he was replaced by a lawyer named Bob Stitser. I began to work with Stitser, and this was happening at the same time when the Ford Foundation was giving its grant to what later became the Native American Rights Fund. And in fact, it was a stipulation of the grant that the only case which we were required to pursue was the *Pyramid Lake* case. Ford Foundation said, “Whatever else you do, you gotta use this money to work on behalf of the Pyramid Lake Paiute Tribe.”

Seney: Do you know why they wrote that in?

Pelcyger: Well, because Pyramid Lake had become something of a *cause célèbre*: President Nixon gave a speech about Indian policy in 1970, and one of the main themes of his speech was that the . . .

Seney: Let me turn this over, Bob.

END SIDE 1, TAPE 1. SESSION I. SEPTEMBER 27, 1995.

BEGIN SIDE 2, TAPE 1. SESSION I. SEPTEMBER 27, 1995.

President Nixon's Presidential Message Highlighted Indian Issues and a Federal Conflict of Interest and He Cited Pyramid Lake as an Example

Pelcyger: One of the main themes of Nixon's presidential message—which I think was the first presidential message specifically on Indian affairs in a long time—was that the Federal Government has not fulfilled its responsibilities and commitments to Indian tribes, and that the Federal government had this horrible conflict of interest, and that the Federal government lawyers had dealt with Indians in a way that would have been unconscionable for private lawyers to do, because they were representing not only—they on one hand had a fiduciary obligation to represent Indian tribes—at the very same time they were representing other directly conflicting [federal] interests, and that this was a situation that was intolerable, and Nixon recommended a creation of a new entity which he called the Indian Trust Council Authority to deal with this severe conflict of interest problem. And the best example of that was Pyramid Lake.

Seney: It was, I suppose, very dramatic how much that lake had dropped. Would that have been part of it?

“ . . . *The Orr Ditch* case . . . Federal government . . . brought in 1913 to establish all the water rights on the Truckee River. . . . the Federal government represented the interests of both the Pyramid Lake Paiute Tribe and the directly-competing interests of the Newlands Reclamation Project, and totally sacrificed and subordinated the rights of the tribe to the rights of the project . . . it was a very clear, very blatant example of this conflict of interest . . . ”

Pelcyger: Sure. And also, there was a lawsuit called *The Orr Ditch* case, which the Federal government had brought in 1913 to establish all the water rights on the Truckee River. And in that lawsuit, the Federal government represented the interests of both the Pyramid Lake Paiute Tribe and the directly-competing interests of the Newlands Reclamation Project, and totally sacrificed and subordinated the rights of the tribe to the rights of the project by not even asserting the water right for fishery purposes. So it was a very clear, very blatant example of this conflict of interest where the tribe's lawyer, which was the government attorney, violated every principle of loyalty and of diligent representation in the legal profession in the United States. And the tribe suffered tremendously as a result of that. These are the kinds of things that Veeder was bringing to the attention—obviously it got to the President of the United States. And Pyramid Lake became a symbol for it, because the lake level had gone down, because the fishery had been destroyed, and because it was such a magnificent resource, and because the conflict was so clear. For example, in other situations, where the dispute was about potentially irrigable land, it's not quite as dramatic, because the Indian land hadn't been developed, and it hadn't been damaged. It was still a conflict, because the government had subsidized then

through the Reclamation program the development of non-Indian lands, which utilized waters to which tribes had a prior right. But there it was potential development that was at issue, whereas in Pyramid Lake it was the destruction of a magnificent resource—a resource not only for the tribe, but on which its sustenance depended, but was a real national treasure as well.

Seney: In terms of the Winters Doctrine and the establishment of the prior right, is 1854 the date for the Pyramid Lake Reservation?

Pelcyger: Eighteen fifty-nine.

Seney: Okay, so that would be the date under Winters Doctrine from which they could draw rights.

Beginning to Work for the Pyramid Lake Paiute Tribe: *Pyramid Lake Paiute Tribe v. Morton*

Pelcyger: Right.

Moved the Work to Boulder, Colorado, in 1971 and Became the National American Rights Fund

Okay, so then we moved to Boulder, from California in 1971.

“ . . . I was essentially special counsel to the Pyramid Lake Paiute Tribe, in which I did principally litigation . . . ”

That was with the Native American Rights Fund, and I was essentially special counsel to the Pyramid Lake Paiute Tribe, in which I did principally litigation—mostly all litigation-related work. The tribe had a general counsel [for whom and with whom]—~~who I worked for and with.~~

Seney: Let me stop you to ask you about *Pyramid Lake Paiute Tribe v. Morton*. (Pelcyger: Yeah.) You were involved in that case?

Pyramid Lake Paiute Tribe v. Morton

Pelcyger: Yes, that was my case.

Seney: Give me the thinking behind that, and what strategizing went on. Because this was the really first important case, was it not, for the Pyramid Lake Paiute Tribe (Pelcyger: Yes.) in terms of establishing their water rights. Talk about that for me.

Pelcyger: Well, essentially, I followed the model of what had been successful in Southern California. The primary adversary of the Pyramid Lake Paiute Tribe was the

Newlands Reclamation Project, which was the first Federal Reclamation project.⁴ I didn't mention, incidentally, previously—I should have—at the same time that all of this was happening, the *cui ui* at Pyramid Lake was designated an endangered species in 1967, under the then Endangered Species [Protection] Act, and so that also was part of the reason for focusing attention on Pyramid Lake.⁵

Seney: Was that an early listing?

In 1967 the Pyramid Lake Cui-ui Was Included in the First Designation of Endangered Species under the Endangered Species Protection Act of 1966

Pelcyger: It was the first listing. There were other species that were included in that first listing, but the Newlands Project was the first Reclamation project in 1902, and the *cui-ui* was among the first endangered species. So that was another reason for its notoriety.

Pyramid Lake and the Background of the Controversy

Let me just describe physically the situation of Pyramid Lake. Pyramid Lake is a very large and very beautiful desert lake—probably the most beautiful desert lake in the world. It's about the same size as Lake Tahoe, about 110,000-120,000 surface acres, about twenty miles long and five miles wide at its widest. It's entirely within the Pyramid Lake Indian Reservation, about the same size as Lake Tahoe. It's the terminus of the Truckee River. It's in the Great Basin, which means that there's no outlet to the sea. All of the Great Basin is self-contained. And the Truckee River originates as the outlet from Lake Tahoe in the Sierra Nevada Mountains, and flows not much more than 100-120 or 130 miles and empties into Pyramid Lake, so Pyramid Lake has no outlet. And most of the Truckee River is in Nevada, and it flows through the metropolitan areas of Reno and Sparks.

The Federal government, in 1902, Congress passed the Reclamation Act, which was intended to reclaim arid areas of the West, and the first project that was constructed under the Reclamation Act was the Newlands Project. Most of the Newlands Project area is located in the Carson River drainage to the south and east of the Truckee. The Carson River runs parallel to the Truckee River, also rising in the Sierra Nevada Mountains of California, and then flowing kind of past Carson

4. The belief that the Newlands Project was the "first" Reclamation project is widely held, but it is somewhat misleading. On March 14, 1903, the Secretary of the Interior approved a memorandum from the U.S. Reclamation Service proposing establishment of the original five Reclamation projects in five different western states: Gunnison Project (now known as the Uncompahgre Project), Milk River Project, Salt River Project, Sweetwater Project (now known as the North Platte Project), and the Truckee Project (now known as the Newlands Project). Reclamation's specification Number 1 was for the Derby Diversion Dam and Truckee Canal, and dedication of Derby Dam occurred on June 17, 1905, exactly three years after the Reclamation Act became law. It is likely that Reclamation itself touted the project as its "first" for the simple political reason that it wanted to cultivate and recognize Senator Francis G. Newlands of Nevada who was the primary sponsor and supporter of passage of the Reclamation Act in 1902. The Newlands Project was one of the first five Reclamation projects.

5. The Endangered Species Protection Act of 1966 was the original version of the law, and the *cui-ui* was placed on the endangered list in 1967. Subsequently Congress revised the law in 1973 and shortened the name to the Endangered Species Act. The oral history of Chester Buchanan in Reclamation's Newlands Project oral history series discusses *cui-ui* issues in considerable detail.

City into the Carson Sink. Most of the land that they wanted to reclaim and irrigate is located in the Carson drainage, but the plan was to divert the Truckee River to supplement the Carson River, to irrigate those lands. And so a diversion dam, Derby Dam, was built on the Truckee River in 1905, and diverted water to a reservoir that was built on the Carson River called Lahontan Reservoir.

“ . . . from 1905 to 1967, about half the flow of the Truckee River was diverted to the Newlands Project. . . .”

Well, from 1905 to 1967, about half the flow of the Truckee River was diverted to the Newlands Project. The Truckee River flows maybe about 500,000 acre feet a year, and the average annual diversion during that entire period was about 250,000 acre feet.

“ . . . dry years they took everything. And generally, they took every drop that was capable of being diverted. The mentality at the time was that any water that flowed to Pyramid Lake was wasted, and every effort was made to make sure that the minimum amount of water flowed to Pyramid Lake. . . .”

Some years, they took everything—dry years they took everything. And generally, they took every drop of that was capable of being diverted. The mentality at the time was that any water that flowed to Pyramid Lake was wasted, and every effort was made to make sure that ~~no water was diverted~~ [the minimum amount of water flowed] to Pyramid Lake.

“ . . . the result was that the level of Pyramid Lake dropped seventy feet, and that a delta was exposed at the mouth of the river where the Truckee River enters the lake. . . .”

So the result was that the level of Pyramid Lake dropped seventy feet, and that a delta was exposed at the mouth of the river where the Truckee River enters the lake.

The Pyramid Lake Paiute Call Themselves Cui-ui Eaters, and the Change in the River Regime Because of Newlands Project Diverisons Adversely Affected Both Cui-ui and Lahontan Cutthroat Trout Spawning

There are two principal species of fish in Pyramid Lake—the *cui-ui* and the Lahontan cutthroat trout—both of which need fresh water to spawn, and their traditional spawning grounds were the Truckee River. The trout used to go all the way upstream up to Lake Tahoe, and into the tributaries above Lake Tahoe. But the *cui-ui* pretty much were limited to the lower river, certainly below Reno and Sparks and mostly within the lower twenty miles of the Truckee River, which is within the Pyramid Lake Indian Reservation.

“The *cui-ui* . . . is unique to Pyramid Lake . . . And . . . the *cui-ui*, were especially important to the Pyramid Lake Paiute Indians. . . .”

The cui-ui, incidentally, is unique to Pyramid Lake—it's not found anywhere else on the planet Earth. Not only is it an endangered species, it's an endangered genus—it's the only pure species left in its genus. And the cui-ui and trout both, but especially the cui-ui, were especially important to the Pyramid Lake Paiute Indians. In fact, their name for themselves is *cui-ui tucutta*, "cui-ui eaters." Different groups of Paiutes were traditionally named after, called themselves, distinguished among themselves, by their principal food source, and the *cui-ui* was the principal food source for the Pyramid Lake Paiutes.

“ . . . it was also very important for ceremonial purposes, all of their major celebrations had to do with the spawning of the cui-ui. . . . ”

And it was also very important for ceremonial purposes, all of their major celebrations had to do with the spawning of the cui-ui.

The Lahontan Cutthroat Went Extinct about 1940, but the Cui-ui, with a Forty Year Lifespan, Were Able to Survive Because Natural High Flows Allowed Them to Spawn Occasionally

So anyway, as the lake level went down, and the delta was exposed at the mouth of the river, it made it virtually impossible for the fish to get to their freshwater spawning grounds. The trout actually became extinct: the Pyramid Lake cutthroat trout, which grew to world record size of forty-two pounds in Pyramid Lake—that's the official record, they think that the unofficial record is sixty pounds.

“ . . . Pyramid Lake has an incredibly fertile and productive lake food chain . . . ”

But the trout are much more like salmon, and Pyramid Lake has an incredibly fertile and productive lake food chain, but the trout became extinct in about 1940. The *cui-ui*, though, are much longer-lived fish, and so they were able to survive—but barely. The trout life span is maybe ten or twelve years, whereas *cui-ui* can live for forty years. And so the *cui-ui* were able to survive because of the infrequent flood years when the Truckee River flowed at times—especially during the spring spawning period—the flow of the Truckee River was much greater than the diversion capabilities of the Newlands Project. So significant amounts of water flowed to Pyramid Lake, and it would cut a channel through the delta, and the fish were able to spawn. If they could spawn once every twenty years or something, then they could survive, so they managed to survive, but were classified as endangered in 1967.

The Orr Ditch Case, a General Stream Adjudication

Well, I guess I ought to tell you a little more about the *Orr Ditch* case. In 1913, the Federal government brought a lawsuit in Federal Court—what's called the general stream adjudication—to establish all the water rights on the Truckee River. And they brought a similar lawsuit on the Carson River in 1925. The principal reason they brought the lawsuit was to establish the water rights of the Newlands

Project, vis-à-vis the people upstream in what's now the Reno-Sparks area who were appropriating water. But the government also sued not only on behalf of the Newlands Project, but also on behalf of the Pyramid Lake Paiute Tribe. And to make a very long and painful and tragic story short . . . (Seney: Not *too* short!) (Pelcyger chuckles) Well, the government, as I indicated before, sought a humongous water right for the Newlands Project, they sought enough water to irrigate 230,000 acres, which is four times more than the project has ever irrigated—they never irrigated much more than about 60,000 acres—but they made every conceivable claim for the Newlands Project, with a 1902 priority, because that's when the project was established. Under Reclamation law, the water rights of projects are established under state law, and state law depends on when water is first put to use, so the priority date couldn't be any earlier than 1902 for the Newlands Project.

The Government only Asserted a Small Water Right for Irrigation on the Pyramid Lake Paiute Reservation

For the Pyramid Lake Indian Reservation, the government didn't assert any water right at all for the fishery, which was the primary purpose of the reservation. It *did* assert, under the Winters Doctrine, a very small water right for irrigation purposes for something like ultimately 6,000 acres.

Seney: About 30,000 acre feet of water?

The government did not forward water rights claims for the Pyramid Lake Paiute Tribe because that would be “. . . inconsistent with the larger interests involved with the reclamation of arid lands in the West, which at that time was the predominant policy. . . .”

Pelcyger: About 30,000 acre feet, for which they've only irrigated about 1,000 acres. The government also promised to build irrigation systems—which is a whole 'nother story—at Pyramid Lake, and never did. So the *Orr Ditch* case, like most water cases, lasted a very long time, and the decree became final in 1944, and the government had this humongous conflict of interest. Throughout the course of the case there were officials in the Bureau of Indian Affairs and others saying, “Why aren't you asserting the water right for Pyramid Lake Indian Tribe?” and the response came back that it would be inconsistent with the larger interests involved with the reclamation of arid lands in the West, which at that time was the predominant policy.

You can go back and scratch your head and read those documents and wonder, “What were they thinking?!” But essentially, it was that the only use of water that was contemplated at that time as being beneficial and important was for agriculture. Well, there were people who were saying, “This is a magnificent resource, and it's vital to the tribe.” And the tribal people were passing around petitions and trying to bring their grievances to the attention of the United States. It all just fell on deaf ears, and the predominant philosophy was that the only really important, highest and best use of water, was for irrigation, or for taking it out of

the stream. The concept of water for recreation purposes or that Pyramid Lake was this magnificent natural resource that was unique and should be protected, didn't come into play until the '60s.

Secretary Udall Creates a Task Force on Pyramid Lake in 1964

So that was what was happening when I became involved. There was one other important thing that happened. Beginning around the early 1960s, Stewart Udall was the Secretary of the Interior. For a variety of reasons, due partly to Bill Veeder's constant, incessant clamoring for attention, and bringing to people's attention what they didn't want to hear, which was that there has been this travesty.

Alvin Josephy's Article about Pyramid Lake

There was also at that time something you ought to maybe look at: There was an important article written in *American Heritage* magazine by an Indian historian named Alvin Josephy, Jr. It was about the Pyramid Lake situation. It was, I think, in 1970. "Here in Nevada, a Terrible Crime," was the title of the piece.

In 1967 the First Operating Criteria and Procedures (OCAP) Were Mandated for the Newlands Project

Anyway, not just because of Pyramid Lake—there were other things that were going on at the same time—but Stewart Udall created a task force in 1964 to look into the situation, to see what could be done about it. And one result of that effort was that in 1967 the Interior Department promulgated what are called OCAP—operating criteria and procedures—for the Newlands Project.

"The goal of the OCAP was to impose constraints . . . for the first time, on the [diversion and use of water by the Newlands Project. . . . the Newlands Project had become known as being one of the most wasteful and inefficient . . . in the country. . . ."

The goal of the OCAP was to impose constraints, impose regulations, for the first time, on the [diversion and] use of water by the Newlands Project. By this time, the Newlands Project had become known as being one of the most wasteful and inefficient, if not *the* most wasteful and inefficient project in the country. In fact, it was really, you go back to I think it's 1914—the Newlands Project was started in 1902, and as early as 1914 the Congress passed a statute writing off seventy-five or eighty percent of the costs of the project, which were supposed to be reimbursable, [realistically paid back] because they realized that it couldn't be reimbursed. As I indicated, they had thought originally about irrigating 230,000 acres of land, which meant that the owners of that land would contribute the costs of the project, and they realized that most of that land would never successfully grow crops. And so the government wrote off seventy-five or eighty percent of the cost of the project saying, "We'll never be able to obtain that, because the project will never be able to fulfill those expectations." So they knew it early-on.

“ . . . the Bureau of Indian Affairs contracted with a very well-known hydrologist, Wayne Criddle from Salt Lake City, and he did an analysis of the project, which indicated it was very wasteful. So these operating criteria and procedures were intended to regulate the use of water on the project. . . .”

But also the Bureau of Indian Affairs contracted with a very well-known hydrologist, Wayne Criddle from Salt Lake City, and he did an analysis of the project, which indicated it was very wasteful. So these operating criteria and procedures were intended to regulate the use of water on the project.

“ . . . the principal water supply for the Newlands Project came from the Carson River—the Truckee River was a supplemental supply, which logically should have meant that the Carson River would be primary, and the Truckee River would be diverted only when the Carson River flows were insufficient to meet the needs of the project. . . .”

For example, one of the most notorious things that was happening was that, as I indicated, the principal water supply for the Newlands Project came from the Carson River—the Truckee River was a supplemental supply, which logically should have meant that the Carson River would be primary, and the Truckee River would be diverted only when the Carson River flows were insufficient to meet the needs of the project. But in fact, that’s not what was happening.

“ . . . up to 1967, the Truckee River was diverted at Derby Dam whenever there was water flowing into it—oftentimes . . . for . . . single-purpose hydroelectric generation. . . .”

And up to 1967, the Truckee River was diverted at Derby Dam whenever there was water flowing into it—oftentimes during the wintertime when Lahontan Reservoir was full and water was being released from Lahontan Reservoir during the winter for hydroelectric generation—single-purpose hydroelectric generation. It wasn’t a lot of power, and it wasn’t very valuable, but it just showed the mentality that any water that went to Pyramid was a waste, and that everything should be done that was possible to make sure that as little as possible got to Pyramid.

Seney: That OCAP put an end to that, didn’t it?

“One of the major accomplishments of the 1967 OCAP was to prohibit the use of single-purpose hydroelectric generation. That made a difference. And the general philosophy of the OCAP was to try to maximize the use of the Carson River and minimize the diversions from the Truckee. . . .”

Pelcyger: One of the major accomplishments of the 1967 OCAP was to prohibit the use of single-purpose hydroelectric generation. That made a difference. And the general philosophy of the OCAP was to try to maximize the use of the Carson River and minimize the diversions from the Truckee. But in my judgment, and the judgment of the tribe, the OCAP, although they were an important first step, were much too lenient on the project.

Pyramid Lake Paiute Tribe v. Morton

Decision to Bring the Suit in Washington, D.C.

And so getting back to *Pyramid Lake Paiute Tribe v. Morton*, I recommended to the tribe, and the tribe adopted the recommendation that we sue the Secretary of the Interior and the Attorney General, and we sue them in Washington, D.C. And there were reasons for that, which I can get into.

Seney: Well, I wish you would, because the people I've interviewed out on the project complain about the fact that this was Judge [Gehard] Gesell's court in Washington, D.C., and what business did it have there? And T-C-I-D [Truckee-Carson Irrigation District] didn't even have representation there, did they? (Pelcyger: Right.) So maybe the reasons for that *are* important.

Pelcyger: Well, I felt that

Seney: Let me ask you this, Bob, before you answer: I've been told that not only maybe did you have the choice, but it was generally the practice to sue the cabinet and secretaries in the courts in Washington, D.C., say, rather than filing that out in Federal District Court in Reno. Did you have a choice? Could you have chosen to do Reno instead of?

Pelcyger: The suit certainly could have been filed in Reno, but at that time especially, you could also—you had a choice—and at that time in particular, a lot of the important cases against cabinet officials were filed in Washington, D.C. Subsequently—this was in 1969 when we filed the case—in the 1970s we were involved in some cases, and in the 1970s it became the practice of the government, in cases *like* this, to seek to transfer them to the jurisdiction where the dispute was located. But the government did not do that in our case, and that practice began a couple of years later.

Seney: Did you have in mind—if I could maybe anticipate—did you have in mind maybe—and I don't know if you *knew* that Judge Gesell would have this case (Pelcyger: No.) Did you know that? (Pelcyger: No.) It was assigned by the presiding judge?

Pelcyger: Yeah, they assign it by random.

Seney: But did you feel maybe more comfortable in the court in D.C. than you would have in the court in Nevada, the Federal District Court, where that was likely to have been, obviously, a local person, who'd risen up and become a district judge?

“If I had to summarize in a sentence the history of Truckee River water for the preceding 100 years, it could be summarized in the sentence, “Everybody against the Indians.” And not just T-C-I-D, but the State of California, the State of Nevada, the City of Reno, the City of Sparks, irrigation that was taking place in the Truckee Meadows . . .”

Pelcyger: Well, yeah. If I had to summarize in a sentence the history of Truckee River water for the preceding 100 years, it could be summarized in the sentence, "Everybody against the Indians." And not just T-C-I-D, but the State of California, the State of Nevada, the City of Reno, the City of Sparks, irrigation that was taking place in the Truckee Meadows, the area around Reno and Sparks, [and was much more significant at that time].

“ . . . everybody got as much water as they wanted at the expense of Pyramid Lake. So my feeling was that the local environment did not provide the best forum for the Pyramid Lake Paiute Tribe to litigate. And interestingly, as a sidelight, this was an issue on which Bill Veeder and I strongly disagreed. . . .”

Everybody on the Carson River, the Newlands Project—everybody got as much water as they wanted at the expense of Pyramid Lake. So my feeling was that the local environment did not provide the best forum for the Pyramid Lake Paiute Tribe to litigate. And interestingly, as a sidelight, this was an issue on which Bill Veeder and I strongly disagreed.

“ . . . that was what *he* was used to doing throughout his career, taking these very controversial cases and litigating them in the teeth of the most hostile environment, and he sort of thrived on that. . . .”

Veeder felt that the case should have been brought in Federal Court in Reno, and that was what *he* was used to doing throughout his career, taking these very controversial cases and litigating them in the teeth of the most hostile environment, and he sort of thrived on that. And Veeder was the kind of person where there was no such thing as a reasonable difference of opinion: you were either with him or you were against him.

“ . . . that decision on my part led to our falling-out, and that relationship never recovered from that. . . .”

And so that decision on my part led to our falling-out, and that relationship never recovered from that. In fact, at one point, he went around the country addressing audiences and telling them what a bad lawyer (chuckles) Bob Pelcyger was.

Seney: That breach has not been healed? Is he still alive?

Pelcyger: Yes, he's still alive. No, it hasn't been healed. We have very little to do with each other anymore—almost nothing. But he was sort of a kamikaze kind of guy, who litigated in hostile district courts.

Seney: Lost frequently?

Pelcyger: Lost frequently, and then got courts of appeal to overturn them, and go back and forth. In any event, I felt like the tribe had everything to gain and nothing to lose by at least trying

END SIDE 2, TAPE 1. SESSION I. SEPTEMBER 27, 1995.
 BEGINNING OF SIDE 1, TAPE 2. SESSION I. SEPTEMBER 27, 1995.

Seney: My name is Donald Seney, and I'm talking to Robert S. Pelcyger in his office in Boulder, Colorado. Today is September 27, 1995, and this is our second tape. Bob, we ran off onto the dead space, so there'll be just a little that we lost. You were saying, again, your thinking was that this case would be better brought in D.C., rather than in Reno.

“... I felt ... there was everything to gain and nothing to lose, because the worst thing that could happen is that the Federal Court in Washington could transfer it out to Nevada, in which case it would have been the same as if it had been brought in Nevada in the first place. . . .”

Pelcyger: Yeah, from the tribe's standpoint. And I felt like, as I said, there was everything to gain and nothing to lose, because the worst thing that could happen is that the Federal Court in Washington could transfer it out to Nevada, in which case it would have been the same as if it had been brought in Nevada in the first place. But it didn't happen.

Seney: When you drew Judge [Gerhard] Gesell, were you glad about that? Did you know him? Did that make a difference, do you think? I mean, judges make a difference. (Pelcyger: Judges make a difference.) We all know this. (Pelcyger: Right.) Did it make a difference, do you recall? Did you say, “Oh, this is not so bad”? He had a reputation, he was a well-known judge for a district judge, because he *did* hear important cases frequently, that had national import, being in D.C.

Judge Gerhard Gesell

Pelcyger: Yeah, but most of the cases for which he is best known came *after* this case, and he had less of a reputation then. I think he had only been on the bench for a pretty short time. He was appointed by Lyndon Johnson, I believe. I didn't know that much about him.

Seney: What were the issues that you brought, and why, in this case?

Sued the Attorney General Asking He Be Ordered to Represent the Pyramid Lake Paiute Tribe's Water Rights Claims

Pelcyger: Well, there were two primary issues, not in order of importance: We also sued the Attorney General, as I mentioned. And the theory here was the same as we did in that Southern California case where we said that—and again, the historical record showed that Federal officials were aware of the travesty, and were aware that the tribe had this Winters Doctrine claim that the government had never asserted, and the government had never done anything about it. And so we sued the Attorney General to require that he do something, take appropriate action.

Seney: Did that part of the suit go anywhere?

Pelcyger: No. By that time, the government had appealed our case in Southern California, and the Ninth Circuit had ruled in that case, in the California case, the *San Luis Rey* case, that the judge was correct to issue an order requiring the government to respond, to make a decision. The government had come back and made a decision, saying, "We chose not to do anything." And the Ninth Circuit said, "Well, under the circumstances, we can force him to make a decision, but we can't tell him what to do." And so I forget exactly what the timing was, but I think that decision came down after the *Pyramid Lake* case was brought, but before that issue had been decided. Courts are very reluctant to oversee the Attorney General, or [government] lawyers and what they decide to do and what they decide not to do, and how they do it and so forth. So that was tough.

Sued the Secretary of the Interior Arguing the 1967 Newlands Project OCAP, and Subsequent OCAPs Were Too Lenient

But the other part of the case was, we sued the Secretary of the Interior, and we basically said that the operating criteria and procedures that he had adopted for the Newlands Project in 1967—and he had issued new ones in subsequent years—that they were much too lenient.

"The primary theory of the case was that the Secretary of the Interior had violated his trust obligation to the Pyramid Lake Paiute Tribe, and that the OCAP allowed much too much water to be diverted to the Newlands Project. . . ."

The primary theory of the case was that the Secretary of the Interior had violated his trust obligation to the Pyramid Lake Paiute Tribe, and that the OCAP allowed much too much water to be diverted to the Newlands Project. On that part we were successful.

Judge Gesell Ruled the the Newlands Project Reduce Water Use from 406,000 Acre Feet to 288,000 Acre Feet a Year

And ultimately, in that case, Judge Gesell, who I would say started out the case kind of feeling sympathetic to the government's position, became more and more outraged as the case went on, and ultimately directed the Secretary of the Interior to adopt new OCAP, new operating criteria and procedures, which instead of allowing 406,000 acre feet of water to be diverted to the Newlands Project, it required that they be reduced by more than 100,000 acre feet to 288,000 acre feet.

Seney: That would be the total on the Newlands would go from 406,000 to 288,000?

". . . most of that savings accrues to the Truckee River, because the . . . Truckee River is the supplemental supply . . . most of the reduction comes on the Truckee side. . . ."

Pelcyger: [From] 406,000 to 288,000, from both the Carson and Truckee Rivers, right. And most of that savings accrues to the Truckee River, because the amount of Carson River water is constant, and so since the Truckee River is the supplemental supply,

if you reduce the total amount, most of the reduction comes on the Truckee side.

Federal Government Chooses Not to Appeal the Decision in *Pyramid Lake Paiute Tribe v. Morton*

Seney: Now, as I mentioned before, T-C-I-D did not seek to join in that case, so it was you representing the Pyramid Lake Paiute Tribe, versus I take it the Attorney General's Office representing Mr. [Rogers] Morton, the Secretary of the Interior (Pelcyger: Right.) were the parties. (Pelcyger: Right.) And the government, I understand, chose not to appeal Judge Gesell's order.

Contrary to some rumors it was not a friendly case and Judge Gesell ordered the government to pay attorney's fees because the "government had litigated in bad faith and was obdurate and intransigent in terms of not carrying out the court's instructions and the manner in which they litigated. . . ."

Pelcyger: That's correct. I've heard it said that it was a friendly lawsuit, and I can tell you it was not a friendly lawsuit. The government vigorously defended the government's prerogatives. In fact, after we prevailed in the case, we filed a motion for attorney's fees, and Judge Gesell granted our attorney's fees, which was subsequently appealed by the government and overturned, but one of the grounds on which he awarded attorney's fees was that the government had litigated in bad faith and was obdurate and intransigent in terms of not carrying out the court's instructions and the manner in which they litigated. So it was anything but a friendly case.

Seney: But even though this was a victory, that T-C-I-D ignored (Pelcyger: That's right.) the ruling on diversions.

T-C-I-D Refused to Abide by the OCAP and the Ruling in *Pyramid Lake Paiute Tribe v. Morton*

Pelcyger: Right. And this was important. In fact, T-C-I-D's position on the OCAP was well known before we brought the lawsuit. They had taken the position when Secretary Udall first adopted the OCAP in 1967, that the Secretary had no authority to do this, and that ~~they~~ [T-C-I-D] weren't going to obey the OCAP. And during the course of the litigation before Judge Gesell—which T-C-I-D was obviously aware of, although as you point out, they chose not to join—they wrote letters to the Bureau of Reclamation and to the Secretary of the Interior saying, "We don't care what you do, we don't care what Judge Gesell does, we're not going to pay any attention to it." And Judge Gesell referred to that in his decision, and in fact between 1967 and 1972, T-C-I-D did not abide by the OCAP—this is before Judge Gesell's decision—and the government didn't do anything about it.

Seney: May I ask, who controlled the diversions at Derby Dam?

Pelcyger: T-C-I-D.

Seney: They would open the gates when they chose?

Pelcyger: Right. They ran the project under a contract that the government entered into with them, called an operation and maintenance contract, in 1926, that had been in effect since '26, pursuant to a general government policy of contracting with local irrigation districts to operate and maintain Federal Reclamation facilities. The government still owned Derby Dam, and *all* of the facilities of the Newlands Project, but T-C-I-D operated and maintained them under this contract. The contract, however, specifically reserved the right of the government to make rules and regulations regarding the use of water. But T-C-I-D's position was what I indicated.

“ . . . Judge Gesell's decision required that the Secretary include in the OCAP, specific sanctions in the event that T-C-I-D failed to comply with them. And one of those sanctions was that the Secretary exercise the authority he retained in the 1926 contract to terminate the contract for breach. . . . ”

So Judge Gesell in his decision noted that the government had failed to enforce even the previous OCAP, which he found to be much too lax, and also noted that T-C-I-D had made no secret of its intent not to obey any future OCAPs. So Judge Gesell's decision required that the Secretary include in the OCAP, specific sanctions in the event that T-C-I-D failed to comply with them. And one of those sanctions was that the Secretary exercise the authority he retained in the 1926 contract to terminate the contract for breach. And that turned out to be important, because as you indicated, T-C-I-D maintained its position that the OCAP were unlawful and refused to comply with them.

Seney: Their general position being, “We own the water rights.”

Pelcyger: Their general position, I don't know. My view is that they were used to doing things the way they wanted to for a very long time, and they weren't going to allow anybody else to tell them what to do. It's like anybody else, if they've been *more* [doing something for more] than fifty years, they were a law unto themselves, and they were not about to recognize any restrictions—although they did comply with the prohibition on [single purpose] hydroelectric generation.

Seney: Right. I've heard them say that, “Well, we gave that up.” The implied statement, there being, that they could have continued if they wanted to, but they gave it up voluntarily.

Pelcyger: And I think the government's position was that it was wasteful and that it was not a beneficial use of water, it was unreasonable. [break]

Seney: As I said, the government decides not to appeal this case (Pelcyger: Right.) although the T-C-I-D ignores it. There's litigation now that begins during this period as well, is there not?

Attempting to Establish the Rights of the Pyramid Lake Paiute Tribe under the

Winters Doctrine

Pelcyger: Right, and that's an important part of the story.

“ . . . a big part of the problem for Pyramid Lake Paiute Tribe was not only did the government construct the Newlands Project, subsidize it, and enable half the water of the Truckee River to be diverted, but then to compound it and rub salt in the wounds, they brought the Orr Ditch litigation. And in the course of the Orr Ditch litigation, the government lawyers, although they were clearly informed and knew that the tribe had a potential claim [for] water under the Winters Doctrine that would have been prior to the Newlands Project's rights, [they] failed to assert that claim. . . . ”

As I indicated, a big part of the problem for Pyramid Lake Paiute Tribe was not only did the government construct the Newlands Project, subsidize it, and enable half the water of the Truckee River to be diverted, but then to compound it and rub salt in the wounds, they brought the Orr Ditch litigation. And in the course of the Orr Ditch litigation, the government lawyers, although they were clearly informed and knew that the tribe had a potential claim [for] water under the Winters Doctrine that would have been prior to the Newlands Project's rights, [they] failed to assert that claim. And the decree became final in 1944.

The Case Was Predicated on the Secretary of the Interior's Responsibility to the Maximum Extent Possible Preserve and Maintain Pyramid Lake and its Fishery

It's important also to recognize conceptually that the *Pyramid Lake Paiute Tribe v. Morton* case was not predicated on the tribe having the water right that was superior to the Newlands Project right. It was predicated instead on the concept that the Secretary of the Interior had a trust responsibility to the Pyramid Lake Paiute Tribe, even though the Newlands Project had a decreed water right and the tribe didn't—for fishery, the tribe didn't have a water right for fishery—nevertheless the Secretary was required to utilize the full extent of his authority to minimize the extent to which the waters of the Truckee River that were necessary to maintain and preserve Pyramid Lake and its fishery were diverted. So it assumed that the Newlands Project had a right to the water and Pyramid Lake didn't, but it said the Secretary had a management responsibility as a result of his fiduciary obligation to the tribe to limit the amount of water diverted to the maximum extent possible.

Seney: Clearly one of your arguments had to have been that while the Newlands Project had water rights, they were taking everything *well* beyond their decreed rights.

Pelcyger: Yes, well beyond their decreed rights. And the Secretary recognized that when he adopted the OCAP in 1967. In fact, one of the stated purposes for the OCAP was to impose controls that heretofore had been lacking to bring the project into compliance with the Federal Court decrees.

“ . . . not only did they build the project, not only did they subordinate the tribe's rights in litigating the *Orr Ditch* case, but . . . having gotten the decree, they

proceeded to ignore it and allow the Newlands Project to run rampant and divert much, much more water than they actually needed. . . .”

So it was adding further salt to the wounds: not only did they build the project, not only did they subordinate the tribe’s rights in litigating the *Orr Ditch* case, but then having gotten the decree, they proceeded to ignore it and allow the Newlands Project to run rampant and divert much, much more water than they actually needed.

Seney: And certainly much more than they had a right to.

Pelcyger: More than they had a right to. And so you had a convergence of doctrines here. Not only was it a trust responsibility, but it was also the concept of waste and unreasonable use or diversion of water, because even under the prior appropriation doctrine there are of course limits on the amount of water that can be diverted, and there are rules to promote the maximum benefits. And the Newlands Project was so wasteful and so inefficient in the way that they were utilizing water, so much of it was wasted, that even those standards were not being met.

Alright, so on the one hand we had a strategy, the Pyramid Lake Paiute Tribe had a strategy to reduce the water that was diverted to the Newlands Project under the OCAP, and the predicates of that theory were waste and unreasonable use of water and fiduciary obligation. And later it was embellished by the Endangered Species Act, and that was one track [on which the tribe proceeded] which assumed that the Newlands Project had a water right, but that ~~they were taking~~ [it was diverting] excessive amounts.

“ . . . the tribe also claimed that it had a prior right under the Winters Doctrine to the water from the Truckee River. Admittedly, it wasn’t recognized in the *Orr Ditch Decree*, but the tribe’s position was that that right still existed, it just hadn’t been recognized in the decree. . . .”

But on the other hand, separate and apart from that, the tribe also claimed that it had a prior right under the Winters Doctrine to the water from the Truckee River. Admittedly, it wasn’t recognized in the *Orr Ditch Decree*, but the tribe’s position was that that right still existed, it just hadn’t been recognized in the decree. And the tribe recognized that until it *was* recognized in a decree, that right couldn’t be satisfied, because ~~you have~~ [the government and everyone else had] to comply with the existing decree. But nevertheless, throughout that period, the tribe was also seeking to have the United States seek to establish that the tribe had a prior right under the Winters Doctrine to enough water to maintain and preserve the Pyramid Lake fishery, and that that right had not been extinguished by either the construction of the Newlands Project, or the *Orr Ditch Decree*.

That, however, was a much, much larger undertaking than OCAP. OCAP was a relatively clean, although complex, lawsuit, because it just involved the validity of the Secretary’s regulations. There was one defendant, the Secretary of the Interior; T-C-I-D eventually got into it, but it was manageable; whereas if the tribe

was going to assert a water right against all of the other claimants to the waters of the Truckee River, and the tribe was going to say, "Our right is first, because it has an 1859 priority," there were thousands and thousands of people who had to be sued, and it was a much larger case. And as I indicated when we first filed the suit in 1969, that's what we asked the Attorney General to do, what we asked the court to order him to seek to establish the tribe's Winters Doctrine right. That [part of the case] got dismissed, but as the case went on before Judge Gesell, and as I indicated, it became apparent that he was becoming more and more outraged by the government's [actions]. The more he found out about the case, the more outraged he became.

The Government Decided to Assert Winters Doctrine Rights in the Supreme Court and Requested Dismissal of the Suit in the District Court in Washington, D.C.

The government became more and more desperate, and at one point the case was scheduled for trial, I don't know, in the fall of 1972, and I think largely in an effort to get out from under what was becoming an increasingly difficult situation for the government, the government decided to initiate the lawsuit to establish the tribe's Winters Doctrine rights. The government, unlike the tribe, had the option of trying to do that, by bringing an original action in the United States Supreme Court. So in 1972, the government filed a case called *United States v. Nevada and California*, in the original jurisdiction of the Supreme Court. And the purpose of the case was to establish the rights of the United States, principally [on behalf of the tribe] for Pyramid Lake, but for other governmental purposes as well— as against the two States. The government's theory was that the Winters Doctrine rights for the Pyramid Lake Indian Reservation, for the fishery, came into existence at the time the reservation had been created, and had not been extinguished subsequently, and should be recognized as being prior and paramount to the other rights that had been decreed. That was filed in the original jurisdiction of the Supreme Court, the United States can bring original actions against States in the Supreme Court, but the Supreme Court doesn't have to hear it.

Seney: Well, the Constitution says cases in which the States are a party, it can grant original jurisdiction.

Pelcyger: Yeah, when one State sues another State, it has exclusive jurisdiction. But when the United States sues a State, it's [the Supreme Courts] jurisdiction is discretionary. So this was going on in 1972. And I'm sure, I know, that the government brought that case—in fact, right after they filed the case, or made up their mind to file it, they filed a motion before Judge Gesell saying, "We're going to sue to establish the tribe's water rights, so dismiss this case, you don't have to do it anymore."

Seney: Did they come to you and say, "Listen, this is what we're going to do, can we work something out?"?

Pelcyger: We were in contact with them at the time. I don't think, I don't recall now, that they tried to make a deal at that time. We were urging them to do this, but they

never made it a condition that we drop our lawsuit, that I recall. But as soon as they did it, they brought it to Judge Gesell's attention and said, "You might as well dismiss this, because now that we have sued to establish the tribe's water rights, that's the real main action." And if you read Judge Gesell's decision, he refers to that in his decision and says, "That's not enough. We've got an immediate problem, we're not going to wait ten years for the Supreme Court to decide this case. You still have a trust responsibility, even if the tribe doesn't have a water right, and so I'm not going to let you out that easy."

The Role of Solicitor General Erwin Griswold in Shaping both *Pyramid Lake Paiute Tribe v. Morton* and the Supreme Court Case for Winters Doctrine Rights for the Tribe

This is all part of the story, but the fact that these two things were happening at the same time played an important part in the government's decision not to appeal the *Pyramid Lake Paiute Tribe v. Morton* decision. The Solicitor General of the United States at that time was Erwin Griswold, who I believe had originally been appointed by Lyndon Johnson, and had been retained very unusually, and retained in office under the Nixon administration. He was the former Dean of the Harvard Law School, and a very, very well-known and very well-respected attorney—one of the most well-respected attorneys in the United States. Because the *United States v. Nevada and California* case was brought before the Supreme Court as an original matter, the Solicitor General, Griswold, played a very active role in that case, because his primary responsibility is to represent the United States in cases before the Supreme Court. Ordinarily, if it was just filed in the District Court, it would never have come to his attention at an early stage. But it came to his attention, he got very interested in it, personally. In fact, I remember one of the things one of the attorneys working for him came across was an old picture from the nineteenth century, which showed Pyramid Lake trout being canned by the Griswold Cannery, or something like that. (laughter) That may have been what sparked his interest, but in any event, when he became aware of what had happened, he thought it was a complete outrage, and that the Pyramid Lake Paiute Tribe had been treated by the United States government in an absolutely unconscionable way, and for him, the way he reacted to it from an ethical standpoint—not the result, but the fact that the government's lawyers had totally subordinated the tribe's claims—which they were supposed to be representing—to other claims which they were representing—that breach of ethical responsibility, professional responsibility was just abhorrent to him. He was very upset about it. I did not argue, but I attended the argument before the Supreme Court on the question of whether the Supreme Court would take the case. When ~~they~~ [the government] filed the case, they filed a motion for leave to file a complaint, because the Supreme Court's jurisdiction is discretionary. And ~~he~~ [Solicitor General Griswold] personally argued it, and he told the Supreme Court how important he felt it was when the United States sued other sovereign States. And I remember specifically him telling the Supreme Court that one reason that he thought they should take the case—which I thought was extraordinary—was that ~~way~~, if the Supreme Court took the case, it would be handled by the Solicitor General's Office, and that way the court could be assured that the tribe would be afforded the

quality of representation which was its due, whereas if it was filed in the District Court and it was handled by lower echelon people, you couldn't trust [that it would be properly handled]. He didn't use those words, but that was the clear implication. So Griswold got involved in it from the standpoint of the lawsuit to establish the tribe's Winters Doctrine right. And then Judge Gesell's decision came down, and Interior recommended an appeal. But the official in the Justice Department who decides on whether any case in which the United States is involved will be appealed is the Solicitor General—not just to the Supreme Court, but to the courts of appeal. And so Griswold said, "No." I mean, he didn't say "no," he said "Hell, no!" He said, "Over my dead body!" and in fact I remember— you might want to, if you can, retrieve this, get the transcript of his argument before the Supreme Court in 1972—because another thing he told the Supreme Court during his argument was that he had decided that the case would *not* be appealed, that Judge Gesell's decision would stand. And [it] probably would have been appealed, had it not been for his involvement in the other case.

Seney: Which is a kind of an irony, because the government lawyers who were fighting you tooth and nail in the *Morton* case decide to file this *United States v. California and Nevada*, which gets Griswold involved. (Pelcyger: That's right.) We can all understand what's going on here—it's kind of an irony.

Pelcyger: Right. And not only that, another part of it was that when the lawyers who were involved for the government at the lower level, both at the Justice and the Interior Departments, originally framed the case, they framed it in a very ambiguous way. The position they took on behalf of the United States was that yes there was indeed a reserved water right under the Winters Doctrine that was created when the reservation was established, but then they went on to describe subsequent events: the enactment of the Reclamation Act, the construction of the Newlands Project, the *Orr Ditch* case, the *Orr Ditch Decree*. They did not take a position about whether the tribe's Winters Doctrine rights survived those subsequent actions, and basically said that there's a dispute about the extent to which the tribe's rights may continue to exist, and we ask the court to resolve that dispute without [the government] taking a position. That was the way that they framed the case when (Seney: It went to Griswold.) it went to Griswold. Griswold studied it and had his staff study it, and they transformed it completely so that the government's position, by the time it was filed in the Supreme Court, was not only did the Winters Doctrine right come into existence when the Reservation was created, but it continues to exist, and that nothing that happened in the interval has resulted in the extinguishment or diminishment of that right, so he also played a key role in that. He was the one who decided that as well. And through the years, I should point out—Griswold recently died, he was in his nineties, I believe—but I kept up with him, and for example, later on, when Senator [Paul] Laxalt tried to get the [California-Nevada] compact rammed through Congress in 1986, during his last year, after he had announced his retirement, I organized a group of former high Federal officials, led by Griswold, who wrote a letter to the Senate Judiciary Committee, strongly opposing the ratification of the compact, and he maintained his interest in this. I can't remember the last time I had contact with him, but it was pretty recently. . . .

END SIDE 1, TAPE 2. SESSION I. SEPTEMBER 27, 1995.
BEGIN SIDE 2, TAPE 2. SESSION I. SEPTEMBER 27, 1995.

Seney: A little of that would have been cut off. You said that former Solicitor General Griswold maintained his interest in the case?

Pelcyger: Right, and we were in contact, and he signed and I think helped to draft a letter from former high Federal officials to the Senate Judiciary Committee, urging them not to ratify the California-Nevada compact in 1986, and pointing out how unfairly and unjustly the tribe had been treated by the Federal government, and that ratification of this compact would compound a whole history of dealings, which was unconscionable.

Seney: As long as you've mentioned the compact, I know the tribe obviously opposed the compact. What was it that made the tribe oppose the compact?

Pelcyger: (big sigh) Well

Seney: Do you want to wait until we get to that in time, and go back and

Pelcyger: It's up to you, whatever you want to do.

Seney: Well, why don't we do that? Why don't we then go back. Did the Supreme Court grant Solicitor General Griswold's motion to hear that original jurisdiction?

Supreme Court Refused to Hear the Winters Doctrine Case

Pelcyger: No. No, the Supreme Court denied it in June of 1973, on the grounds that essentially they're too important to be a trial court, and that the case should be filed in the District Court, and they would be around to hear it on review, but that although they had discretion to exercise their original jurisdiction, they were very reluctant to do that, and would only do that in the most unusual cases.

Seney: There were facts to try.

Pelcyger: There were facts to try, and that even though they could appoint a master, and would have done that, that these original cases, cases in which they act as a trial court, take a disproportionate amount of time, and that hinders their primary function as being the highest appellate court in the country. So they sent it back and the case was refiled in Nevada.

United States v. TCID (Nevada v. United States)

Seney: And it becomes Nevada against

Pelcyger: It became, in the District Court it was *United States v. T-C-I-D*, and then ultimately when it got back to the Supreme Court it's known as *Nevada v. United States*.

Seney: Right. Did you play any part in that case? (Pelcyger: Yes.) Did you argue? Tell me what you did in that case.

Lost the Case in the District Court, Won the Appeal to the Ninth Circuit, and Lost the Appeal to the Supreme Court

Pelcyger: Well, I was the tribe's principal attorney. The tribe intervened and we were on the same side as the government, and we had a fifty-three-day trial—of course a large amount of discovery as well.

The Supreme Court Held the Orr Ditch Decree to Be Final under the Doctrine of Res Judicata

We lost in the District Court, we had legally a partial victory, but practically a complete victory before the Ninth Circuit, and then the Supreme Court took the case and reversed our victory in the Ninth Circuit, and held that the *Orr Ditch Decree*, under the doctrine of *res judicata*, was final.

Seney: The doctrine of *res judicata*—for the non-lawyers who'll read this—is?

Pelcyger: The doctrine of *res judicata* is basically the principle of finality, that there has to be an end to litigation, and that once a case has been litigated to a conclusion, that it can't be reopened, or shouldn't be reopened; it's a doctrine of repose. It says that if you allowed cases to be reopened, there would never be an end to litigation, and that even if a court was wrong, once there was a fair and full opportunity to litigate an issue and it was resolved, or a claim and it was resolved, that the decision is final.

"We felt that *res judicata* didn't apply because the tribe did *not* have a fair and full opportunity to be heard. . . ."

We felt that *res judicata* didn't apply because the tribe did *not* have a fair and full opportunity to be heard. The decision of the Ninth Circuit was interesting. I don't know if I indicated this, but after the Supreme Court declined to exercise its original jurisdiction, the government then went and filed suit in Nevada, and it sued about 17,000 individuals—all of the water right owners under the *Orr Ditch Decree* and their successors in interest, as well as all of the water users on the Newlands Project. Obviously, there were not 17,000 people in the courtroom at the same time, but there were a whole bunch of lawyers, and it was a difficult case to manage, and being involved in that case, in the trial of the case, vindicated my judgment to file the original *Pyramid Lake Paiute Tribe v. Morton* case in Washington, D.C. (laughter) There were many times I wished I'd been in Washington, D.C. rather than the local Federal Court, although they brought in a visiting judge for the case from Idaho.

Seney: Well, my understanding is that's not uncommon, because so frequently the Federal district judges are water right holders.

Pelcyger: I don't know about "so frequently," but in this case . . .

Seney: It was the case.

The Federal District Judge in Reno Held Water Rights under the Orr Ditch Decree and a Judge Came in from Idaho

Pelcyger: There was only one Federal district judge in Reno, Judge Bruce Thompson, and he *did* have water rights under the Orr Ditch Decree—I think he was a defendant in the case.

Seney: Is that right?

Pelcyger: He was a defendant. He didn't play an active role in it, but he was named as a defendant. So a judge was brought in from Idaho.

Seney: You said it was a kind of half-hearted, ambiguous petition, the original one that Solicitor General Griswold got from the Justice Department, and revamped and so forth. What was your view once the Supreme Court said, "No, we won't take this in original jurisdiction; you've got to go start in the District Courts"—back in the Attorney General's hands again—what was your impression of, what is your memory of, their litigation of that? Were they vigorous? Did you have conflicts as you tried to work on the same side? How did that work out?

The Government Had to File the Solicitor General's Complaint Laid Before the Supreme Court Because the Solicitor General's Decisions Are Final in the Justice Department

Pelcyger: Once the case was brought, even though the Supreme Court didn't take the case, nevertheless the Solicitor General within the Justice Department is the ultimate decision-maker. Once he decides an issue or a matter, that's the Federal government's position—at least until it's overturned by a court. And so when the government filed the case in the District Court after the Supreme Court declined to exercise its original jurisdiction, it filed the identical complaint; they could not at that point have done anything differently, because as I said, the Solicitor General governs.

Seney: And his approach to the case, as he decided to approach the case . . .

Pelcyger: That was the government's theory.

Seney: That *was* the government's theory now.

A 1951 Claim Against the Government Regarding Land Dealings and Water Rights at the Indian Claims Commission Was Just Maturing as *Nevada V. United States* Came up

Pelcyger: Yes. And the lawyers were good lawyers, and we worked closely and

cooperatively with them. We did run into some conflicts along the way, which are, I would say, probably inevitable. One of the conflicts came about as a result of the fact that the tribe, back in 1951, under the Indian Claims Commission Statute—I don't know if you're familiar with that, but Congress passed a law in 1946 that allowed tribes to sue the United States in a special forum that they created called the Indian Claims Commission, to obtain damages as a result of the government's dishonorable dealings in the past. And the Pyramid Lake Paiute Tribe had sued the government for their land dealings, but they also included a claim for the botched water rights. And oddly enough, that was happening too, at the same time. Even though the claim was filed in 1951, it took twenty years or so to deal with the land issue. And so the tribe still had this claim for monetary damages against the Federal government that was pending in the Indian Claims Commission. They were represented by another lawyer, an attorney named, I. S. Weisbrodt, a pretty well-known Indian claims lawyer in Washington. And that case was preceding before the Indian Claims Commission at the same time that all this other stuff was going on, and in fact was scheduled to go to trial before the Indian Claims Commission, in which the government is the defendant. This is the conflict all over again—a different *kind* of conflict. Just about the same time that the *United States v. T-C-I-D* was getting ready to go to trial.

Lawyers in the Two Proceedings Had Differing Positions They Wanted to Take

And so the lawyers who are representing the United States in our case, in *U.S. v. T-C-I-D*, were strong advocates for the tribe's position. But there were the lawyers in the Justice Department who were defending the United States' position in the Indian Claims Commission who wanted to take positions contrary to those. For example, one of the exceptions to the *res judicata* doctrine is we thought where there's a strong public policy, that would be subverted if *res judicata* was applied. And one of the things that we were arguing, that the government wanted to argue, was that Pyramid Lake was this magnificent natural resource, and that under the Endangered Species Act and other laws, that in this case there should be an exception to *res judicata*; and that if the tribe's water right was recognized, Pyramid Lake could once again be magnificent. Well, the government's position, the claims lawyers, were saying, "Oh, Pyramid Lake would have gone away anyway, and it was a terminal lake, and it was going to eventually become too saline for fish, and it really wasn't the government's actions, and it really wasn't such a great fishery in the first place," because they were trying to minimize the government's liability in damages. So we ran into problems like that, and that ultimately led to a settlement of the claims case, almost on the eve of trial, so that we could get that out of the way, and we didn't have to deal with it.

Seney: So the federal government wasn't talking out of both sides of its mouth on this.

Pelcyger: Right. And this is, I think, also important, because there are lessons here that apply elsewhere, but I'd say that during the trial of the case, the government's lawyers and the tribe's lawyers worked very well together. There are always going to be differences, just in trial strategy, and we all respected each other. There was never any suspicion that they were trying to do anything that would weaken the case.

And as a general matter, we got along extremely well.

Problems Between Government and Tribal Lawyers During the Appeal

There began to be problems on appeal. The lawyer that the Justice Department assigned to the case didn't believe in it, and we had a heck of a time with him for a while.

Seney: This is the one who took it to the Supreme Court?

Pelcyger: No, this is the one who was writing the brief when it went to the Court of Appeals. But then—and this is interesting—by the time the case got to the Supreme Court, there was a new Secretary of the Interior, there was a new administration [the Reagan administration] in Washington. Jim Watt was the Secretary of the Interior. Probably the guy who *made* him Secretary of the Interior was Paul Laxalt, the senator from Nevada who was President Reagan's best friend. And the Solicitor of the Interior Department was a lawyer from Montana named Bill Coldiron who was no friend of Indians, and no friend of the reserved rights doctrine. I'm trying to think now of the sequence. As I indicated, we had a partial victory in the Ninth Circuit—partial legal victory but complete practical victory, because the Ninth Circuit ruled in favor of *res judicata*, against the tribe with regard to all the water right owners on the Truckee River except the Newlands Project, and said that because we had the government representing both the tribe and the Newlands Project against everybody else, and so they said that under the circumstances, the tribe was bound and couldn't assert its Winters Doctrine claim against all these other people, but where there was not a full and fair opportunity for the tribe and the Newlands Project to litigate against each other, and therefore that *res judicata* would not preclude the tribe from establishing a prior right against the Newlands Project. And since the Newlands Project was by far and away the principal diverter of water from the stream, and had the most junior priority, we always felt that if we could get the water that was otherwise diverted to the Newlands Project, there would be enough to sustain Pyramid Lake. So we strongly supported the Ninth Circuit's decision. And when the case got to the Supreme Court, the State of Nevada and T-C-I-D petitioned and asked the Supreme Court to overturn that portion of the Ninth Circuit's decision. And [Solicitor] Coldiron in the Interior Department wrote to the Justice Department and urged that the Justice Department concede that the Ninth Circuit was wrong. The Justice Department didn't do that. Rex Lee at that time was the Solicitor General and he strongly supported the tribe's position. But it does show how things changed, and just because the government comes into a case on behalf of a tribe and does a good job at one stage, doesn't mean that they're going to be able to fulfill that and carry through on that.

Seney: Especially when this takes so long, you'll have changes in administrations.

Pelcyger: Absolutely. Right.

Seney: Now, but simultaneous to this, there's other litigation going on, is there not, to get them to go along with the OCAP? (Pelcyger: Uh-huh.) What else is happening on

the legal front while this Supreme Court case is being argued?

How to Get More Water for Pyramid Lake: a Three Pronged Approach

Pelcyger: Well, going back to the OCAP . . . I guess we are going to be pretty easily talking for four hours! (laughter)

One thing I want to point out, which is kind of a constant and very important theme for the whole Pyramid Lake controversy, was that from the outset there were at least two, and there subsequently became three, alternate tracks. The goal was to get more water for Pyramid Lake, and to especially reduce diversions to the Newlands Project. The first track was the OCAP track in which we basically, the theory was, “Well, even if the Newlands Project has a water right and the tribe doesn’t, nevertheless they’re diverting too much water for three or four reasons: it’s wasteful, it’s inconsistent with the fiduciary obligation, it’s contrary to the Endangered Species Act.” At the same time we were proceeding down that track, we also took a more frontal approach, saying that the tribe *has* a prior right under the Winters Doctrine, and ultimately we were not successful. In 1983 the Supreme Court ruled against us on that. Then the third track became legislation. As you know, in 1990 Congress enacted legislation which I think ultimately, at least from the tribe’s standpoint, coming on the heels of the loss before the Supreme Court, ultimately I think will result in *much* greater benefits for the tribe than it would have received if we had won in the Supreme Court.

“ . . . there are those three different tracks, and the first two, from the beginning, were alternate tracks, so that if one didn’t work, the other, we hoped, would. And it turned out that way. . . . ”

But there are those three different tracks, and the first two, from the beginning, were alternate tracks, so that if one didn’t work, the other, we hoped, would. And it turned out that way.

TCID Refused to Obey the Ruling in *Pyramid Lake Paiute Tribe V. Morton*

So on OCAP, Judge Gesell’s decision became final, and Interior, somewhat reluctantly, accepted it, because again, once [Solicitor General] Griswold decided it wasn’t going to be appealed, the Secretary was bound by Judge Gesell’s decision. If ~~they~~ [Interior] didn’t obey it, he would risk contempt. So ~~they~~ [Interior] promulgated the OCAP that Judge Gesell directed them to adopt and enforce. (sigh) As I indicated, one provision of the OCAP was that if T-C-I-D failed to comply with it, the Secretary would invoke his right under the ‘26 contract to terminate the contract. So Judge Gesell’s decision came down, ultimately, I think, in February of 1973.

The Department of the Interior, Bureau of Reclamation Began to Implement Judge Gesell’s Decision in *Pyramid Lake Paiute Tribe v. Morton*

And Interior, the Bureau of Reclamation, went about then the enforcement of it.

And true to its word, T-C-I-D refused to comply. And there's a lot of correspondence in the spring and summer of 1973, back and forth, between Reclamation and T-C-I-D. Reclamation writes to T-C-I-D and says, "You're diverting too much water. You're not setting up an operations center which you're required to do under the OCAP. And you're not doing other things that are required. You're not enforcing the provision that prevents deliveries of water to non-water-righted lands." But the principal thing was that they were diverting too much water in excess of what was allowed under the OCAP.

TCID Continued to Divert Water in Violation of the OCAP Established by the Department of the Interior/Bureau of Reclamation in Order to Comply with Judge Gesell's Decision

And T-C-I-D wavered back and forth, but ultimately just deliberately decided it was going to continue to do what they had been doing for fifty years. And the Secretary and the Solicitor wrote back and said, "Look, if you continue to violate the OCAP, we're not going to have any choice, we're going to have to terminate the contract."

Secretary of the Interior Rogers C. B. Morton notified TCID of termination of the 1926 O&M contract and that "... if you continue to divert water in violation of the OCAP, ultimately you're going to have to return every drop of water that you illegally divert ..."

T-C-I-D continued to divert, and so in September of 1973, Secretary [Rogers C. B.] Morton wrote a letter to T-C-I-D notifying it that he was invoking his right to terminate the 1926 contract. That was the first, and to my knowledge, still the only time when Federal government has ever terminated a contract with an irrigation project. This becomes important as well: Under the terms of the 1926 contract, it was provided that the Secretary had a right to terminate for breach of contract, but that he had to give one year prior notification before the termination would become effective. And so that's what the Secretary did. But in his letter, Secretary Morton said, "Look, I recognize that T-C-I-D is going to continue to control the nozzle at Derby Dam, the gates at Derby Dam, after the contract is terminated, but you're hereby given notice that if you continue to divert water in violation of the OCAP, ultimately you're going to have to return every drop of water that you illegally divert to Pyramid Lake." And he provided an example in the letter. "If the OCAP limits you to 288,000 acre feet, and you divert 100,000 acre feet more than that, you're going to have to return that to Pyramid Lake."

"... T-C-I-D continued to disregard the OCAP. And then ... T-C-I-D filed its own suit in Federal Court in Reno, against the Secretary ... claiming ... the 1973 OCAP ... were illegal and they were not binding ... and that the termination of the contract was also illegal. ... Interior Department decided that since T-C-I-D had filed a lawsuit, that it would not send in the marshals to take over Derby Dam ... And it took about ten years for that suit to be litigated to conclusion. ..."

So T-C-I-D continued to disregard the OCAP. And then, I think, in March of

1974, T-C-I-D filed its *own* suit in Federal Court in Reno, against the Secretary of the Interior, claiming that the 1973 OCAP that were imposed by Judge Gesell were illegal and they were not binding on T-C-I-D and the Secretary didn't have authority to do it, *and* that the termination of the contract was also illegal. The Interior Department decided that since T-C-I-D had filed a lawsuit, that it would not send in the marshals to take over Derby Dam, and that at least pending the outcome of the lawsuit, T-C-I-D would continue to control the diversions at Derby Dam. And it took about ten years for that suit to be litigated to conclusion.

Judge Bruce Thompson Decided to Hold the Case until *Nevada v. United States* Ran its Course in the Supreme Court and That Was Why it Took So Long

In fact, it was before Judge Bruce Thompson, and he knew what was going on in the other case, and he tended to side, and be very sympathetic to the farmers on the project, and to feel that they needed protection from the Federal government. He somehow got it in his mind that the Federal government had terminated the contract against T-C-I-D in order to make it more difficult for T-C-I-D to defend itself in the other Winters Doctrine litigation. So he decided—I don't think he told us this—but it appeared in his final decision, that he was going to just sit on this case that T-C-I-D filed, until the case that ultimately went to the Supreme Court was decided.

Judge Thompson Ruled Against TCID in August of 1983 and Said TCID's Taking the Course it Did Contrary to Judge Gesell's Decision Was Inexcusable

Well, the Supreme Court case was decided in June of 1983, and sure enough in August of 1983 Judge Thompson issued his decision, in which he ruled in favor of the tribe [,and the government]. The tribe intervened in the case, and again we were allied with the United States. And he ruled in favor of the United States and the tribe and held that the OCAP were valid, and he said that the contract was validly terminated. He had some paragraphs in his decision which were not too complimentary to Judge Gesell, but he really came down hard, even though he was sympathetic to T-C-I-D and the farmers, and basically said that their conduct was inexcusable, and that they had no right to resort to self-help, and it was incomprehensible how they could just take the law into their own hands. Whatever objections they may have had, legitimate or otherwise, that was one thing that they couldn't do.

“ . . . that really was important to us, because we had this crushing defeat before the Supreme Court in June of '83, and then two months later we were resuscitated. . . . ”

So he rejected T-C-I-D's case in August of 1983, so that really was important to us, because we had this crushing defeat before the Supreme Court in June of '83, and then two months later we were resuscitated.

Seney: Back in business again.

TCID's Appeal to the Ninth Circuit Resulted in the Court Reaffirming the Decisions of Judge Thompson and Judge Gesell

Pelcyger: Right. And that case was appealed by T-C-I-D, but the Ninth Circuit affirmed Judge Thompson, and reaffirmed Judge Gesell's decision.

TCID People Tend to Think the Ninth Circuit Is Against Them but There Are Many Judges and They Are Assigned Randomly to the Cases the Come in on Appeal

Seney: You know, in interviewing the people out on the project, they complained that the Ninth Circuit Court—I can't remember what term they used for it—it's something like "the Indian Court of Appeals," and their feeling is, you always win there. Do you do pretty well with the Ninth Circuit?

Pelcyger: Our record is pretty good.

TCID's "... record was very good before Judge Thompson, except in this one case, but he had four or five others in which he always ruled in *their* favor. ..."

But their record was very good before Judge Thompson, except in this one case, but he had four or five others in which he always ruled in *their* favor. But the Ninth Circuit consists of over twenty judges, and of course when a case is decided, you only get three of them, and they're never the same three. So there have been a large number of judges who have—I don't know how many cases there have been, I don't know if you've counted them, but there are at least ten, probably, so we may have had between twenty and thirty different judges who have sat on the Ninth Circuit. It hasn't been one judge.

Seney: But you win there, and they upheld Judge Thompson and say that the contract can be voided at this point.

Illegal Diversions and Recoupment of the 1,058,000 Acre Feet of Water Diverted Illegally Between 1973 and 1984

Pelcyger: Right. And that was in 1984. In the meantime, during this period from 1973 to 1983, T-C-I-D continued to divert whatever they wanted to, which has now been computed to be, they diverted, illegally, 1,058,000 acre feet of water. Pyramid Lake would be ten feet higher today if that water had not been diverted. And keep in mind that Secretary Morton wrote in 1973 that any water that you divert illegally, you're ultimately going to have to repay.

Seney: He put them on notice.

"... they proceeded at their own risk, with full knowledge of the consequences. . ."

Pelcyger: He put them on notice. So they proceeded at their own risk, with full knowledge of the consequences.

Seney: This is now known as the recoupment issue (Pelcyger: That's correct.) which is a *very* thorny problem between the district and the tribe.

Pelcyger: And the government.

Seney: And the government, right.

Pelcyger: And was also addressed by Congress, because when this matter came before Congress in the Settlement Act [Public Law 101-618],⁶ Congress directed the Secretary of the Interior first to seek a settlement of the recoupment case, and included in the legislation some incentives to promote a settlement, and actually imposed a moratorium preventing anybody except the Federal government from suing to get back the water for seven years, but then said that if nothing was done it directed the Secretary of the Interior to get the water back.

Seney: Right. Now once the Circuit Court makes its decision, do you begin then to try to get the water back before what you've just described, the elements of the settlement legislation?

Pelcyger: We tried. We wrote letters, but they were never answered.

Seney: Bob, why don't we stop here? The tape is about to run out, and this will be the end of the first session, and we'll come back in a while and talk some more.

Pelcyger: Okay.

Seney: Okay, good.

END SIDE 2, TAPE 2. SESSION I. SEPTEMBER 27, 1995.

BEGIN SIDE 1, TAPE 1. SESSION II. SEPTEMBER 27, 1995.

Seney: My name is Donald Seney, I'm with Robert S. Pelcyger in his office in Boulder, Colorado. Today is September 27, 1995, this is our second session, and this is Tape 1.

6. Referring to Public Law 101-618 which became law on November 16, 1990. The law contains two acts: The Fallon Paiute-Shoshone Tribal Settlement Act and the Truckee-Carson-Pyramid Lake Water Rights Settlement Act. The main topics of the legislation are:

- Fallon Paiute-Shoshone Tribal Settlement Act
- Interstate allocation of waters of the Truckee and Carson rivers.
- Negotiation of a new Truckee River Operating Agreement (TROA)
- Water rights purchase program is authorized for the Lahontan Valley wetlands, with the intent of sustaining an average of about 25,000 acres of wetlands.
- Recovery program is to be developed for the Pyramid Lake cui-ui and Lahontan cutthroat trout
- The Newlands Project is re-authorized to serve additional purposes, including recreation, fish and wildlife, and municipal water supply for Churchill and Lyon Counties. A project efficiency study is required
- Contingencies are placed on the effective date of the legislation and various parties to the settlement are required to dismiss specified litigation.

Source is: http://www.usbr.gov/mp/lbao/public_law_101-618.html accessed on December 7, 2011, at about 2:00 in the afternoon.

Bob, we were talking about the OCAP business and the recoupment.

The Alpine Decree Becomes Final

Pelcyger: Right. Well, let me pick up another trail here, which turns out to be extremely important. This is just to finish with the *T-C-I-D* case: Judge Thompson's decision affirming the validity of the OCAP, and of the Secretary's termination of the 1926 contract, came out in August of 1983, I think, and I indicated that the timing of that was significant, because it gave us, really, a very needed boost. And then of course T-C-I-D appealed that decision to the Ninth Circuit; the Ninth Circuit affirmed Judge Thompson's decision. In 1984—I'm not sure exactly when—they petitioned to the Supreme Court. The Supreme Court denied cert. 1984 or 1985. After that, then attention and focus shifted to a new OCAP. The Interior Department basically promulgated interim OCAP. One of the important developments that had happened between 1973 and 1984 was that the final decree in the *Alpine* case was issued in 1980, and that was also appealed. The tribe was an *amicus curiae* in that case, and ~~that~~ [the decision] had some good things and some bad things. The *Alpine* case was the adjudication of water rights on the Carson River, which also involved the Newlands Project. The Newlands Project's rights are both on the Truckee and the Carson, and therefore come under both the Orr Ditch and the Alpine Decrees. Prior to 1980, there was an order in effect called the Temporary Restraining Order in the *Alpine* case, under which the water duties on the Newlands Project were quantified for the Carson Division of the Newlands Project at 2.92 acre feet per acre, which was different than [the water duties of] 3.5 and 4.5 in the *Orr Ditch* case. And so Judge Gesell's 1973 OCAP were predicated in part on the 2.92 acre feet per acre water duty of the Temporary Restraining Order. But in 1980, the Temporary Restraining Order was terminated and Judge Thompson finalized the Alpine Decree in which, among other things, he substituted the 3.5 and 4.5 acre-foot water duties which had been in the *Orr Ditch Decree*, for the 2.92 which had previously been in the Alpine Temporary Restraining Order. And so we knew that change in the Alpine Decree meant that there needed to be corresponding changes in the OCAP.

The Political Climate in Terms of the Pyramid Lake Paiute Tribe

Keep in mind, Senator [Paul] Laxalt was the senior senator from Nevada, and he was very powerful. The junior senator from Nevada was a crony of his, Chic Hecht, and Senator Laxalt was President Reagan's closest friend, and he took a major interest in these matters, and he was foursquare in favor of T-C-I-D and Sierra Pacific Power Company and against the tribe—he made no secret of that. And Jim Watt was the Secretary of the Interior, but on this issue, he was taking his marching orders from Senator Laxalt. And so it was not a good friendly time for the Pyramid Lake Paiute Tribe, politically. I think I mentioned earlier this was the same period when Bill Coldiron, the Solicitor [of the Interior Department] asked the Justice Department to reverse its position in the *Winters Doctrine* case. So generally speaking, this was a time in which we were not seeking major gains, we were seeking to maintain whatever we could, and to avoid the worst. And I think we generally succeeded in that. So this was not a time when we were going to press ahead on something like recoupment, for strategic reasons. Besides that, to

the extent that Interior was thinking at all about recoupment, they at that time, would have just said, “There won’t be *any* recoupment.” And in fact, when Interior in, what, 1986 or thereabouts, issued a draft environmental impact statement for the OCAP, which eventually became the 1988 OCAP, included in that proposal was a provision that would eliminate any recoupment obligation. Ultimately, we persuaded Interior to delete that provision and be neutral on recoupment in the 1988 OCAP.

Seney: How did you persuade them to do that?

Pelcyger: Well, I’m not sure, we just basically said, “It’s not an OCAP matter,” and that we could deal with that separately and that it would be contrary to the trust obligation and we’d sue them.

Seney: It wasn’t a matter of mobilizing a lot of forces in a big political campaign, or was it?

Pelcyger: No.

Seney: Not in that case?

Pelcyger: Not in that case. After Senator Laxalt left in 1986.

Seney: Let me stop you a minute and talk maybe about the interstate compact now. You mentioned it in the context of former Solicitor [General] Griswold.

The Pyramid Lake Paiute Tribe “. . . remained steadfast and continued to devote a major, major portion of its pretty minuscule resources to this effort. . . . and there’s a lot of political pressure to use it for their own members, and not to pay lawyers and not to engage in activities that are costly, and which are risky. . . .”

Pelcyger: Right. Let me go back—there’s an important thing before that. But even before anything else, let me say this: We’ve been talking about litigation and we’ve been talking about strategies and things that lawyers do, but one of the things I want to make clear is that the hero in all this is the Pyramid Lake Paiute Tribe. The tribe is small, it does not have great resources—in fact, it’s a pretty poor tribe. The real story here is of the tribe here, and the resources that they committed to this struggle and the fact it has have been so persistent and survived all of the ups and downs. When we started on this, which is very different than where we are now, as I’ve indicated, it was everybody against the tribe. And the tribe stood its ground and never retreated. We lost in the Supreme Court, and it was a major blow because we all had very high hopes and expectations. We thought that the Ninth Circuit’s decision at least would stand, and should stand, and that no court in its right mind would say that whatever happened in *Orr Ditch* was fair. But the Supreme Court rejected our position unanimously, and through it all the tribe remained steadfast and continued to devote a major, major portion of its pretty minuscule resources to this effort. That’s something that we don’t talk a lot about but is an absolutely critical part.

- Seney: Well, as you know, I'll be talking to Joe Ely and Alvin James and Norman Harry too, and I'll get that perspective from them.
- Pelcyger: And there are others: guys like Gordon Frazier and Clifford Davis who are long-time council members throughout this period—and Glorine Guerro—who are just steadfast in their determination that the Pyramid Lake Paiute Tribe, the *cui-ui*, and Pyramid Lake are inseparable, and that their mission was to restore it, and that they were not going to be deterred. And it's hard, because they're poor, and as I said, they have pretty meager resources, and there's a lot of political pressure to use it for their own members, and not to pay lawyers and not to engage in activities that are costly, and which are risky. So anyway, I just wanted to say that.

Stampede Reservoir

Now another thing in this which played ultimately a very critical role—we want to get to the compact—but Stampede Reservoir. We've got to talk about Stampede Reservoir.

- Seney: Sure, go right ahead.
- Pelcyger: Stampede Reservoir is a very interesting story. Stampede Reservoir was authorized originally as part of the Washoe Project Act in 1956. It was projected to be, and *is*, a large reservoir on the Little Truckee River above Boca [Reservoir]. The Washoe Project Act was interesting—I wasn't, of course, involved in that, it was between 1954 and 1956—but that was the first time that the tribe ever really got involved politically, and they hired a lawyer, and the lawyer made a very impressive appearance before a House subcommittee that was considering the Washoe Project legislation, and basically I remember his presentation—I forget his name—McGinnis, or something like that. But in any event, the basic theme was that the Bureau of Reclamation was proposing to build Stampede Reservoir on the Little Truckee River, and Watasheamu Reservoir on the Upper Carson River, and that the combined effect of both of these reservoirs would be absolute curtains for Pyramid Lake, because Watasheamu would mean that there was less water from the Carson flowing into Lahontan Reservoir, and the difference would have to be made up from the Truckee. Stampede with 200,000 acre-foot capacity would basically impound and divert to others all the water that Pyramid Lake had been receiving. Well, most of the water they'd been receiving between 1905 and 1967. The last remaining flood flows that couldn't be impounded in Tahoe would be impounded in Stampede. So it was the death knell, and this attorney came before the committee and said—everybody else in Nevada is supporting the Washoe Project, and he said into this House, "Here comes one uninvited guest, and it's the Pyramid Lake Paiute Tribe." He told the story to the Congress for the first time of what had happened to Pyramid Lake with the Newlands Project, and you could almost, as you read the transcript, you can almost see the faces of the congressmen saying, "My God, how can we allow this to happen?" In particular, the chairman of the House subcommittee that was hearing this was, I think, Clair Engle [of California]. But in any event, there was a Nevada congressman named Cliff Young, who is now on the Nevada Supreme Court, and he helped turn things around, and so that the Washoe

Project Act, while it included Stampede and Watasheamu, also included the Marble Bluff Dam and Fishway as being an authorized component of it, and specifically directed that flows from Stampede be made available to Pyramid Lake. It was the first positive thing that Congress had done, and it recognized the national importance of Pyramid Lake, and the fact that it had been almost destroyed as a result of the Federal government's actions.

Anyway, so Stewart Udall was Secretary of the Interior in 1965, 1966, when the Bureau of Reclamation got around to trying to figure out what to do about Stampede, and there was a lot of pressure from Nevada to build Stampede. Senator Allan Bible was the senator from Nevada who I believe was also Chairman of the Senate Appropriations Committee, so he was a Democrat and very powerful, and he wanted to have it built. This was where I think it might have been, anyway, the first time where Bill Veeder got involved. He was with the Bureau of Indian Affairs and he saw correctly that constructing Stampede would be the death knell, would be the last nail in the coffin. So he mounted an offensive, and this was the first time the Bureau of Indian Affairs sort of really began to be an advocate for Indian Affairs on natural resource issues. And the Bureau of Indian Affairs objected to the construction of Stampede, to make, again, another long story short, You want to make it long?! (laughs)

Seney: Don't make it too short!

Udall Was Pressured to Build Stampede Reservoir but Also Pressured about the Pyramid Lake Issue So He Ultimately Decided to Build the Reservoir but Not Do a Water Contract with Sierra Pacific Power Company until the Pyramid Lake Issue Was Settled

Pelcyger: Well, Udall was just torn, and he was under great political pressure from Nevada to build Stampede, but at the same time he was sympathetic to the Indian concerns and he had formed this task force in 1964, and that was part of what they did, was look at Stampede and Watasheamu, but he had Senator Bible who wanted it. Finally he split the apple. He said, "Alright, I'm going to go ahead and build Stampede, but we're going to operate it for flood control purposes and as a recreation reservoir," and to help provide inflows to Pyramid Lake, "but I'm not going to allocate any of the water specifically to Sierra Pacific Power Company for Reno and Sparks until this Pyramid Lake mess is straightened out." And his justification for that also relied heavily on the fact that Stampede was going to be built above Boca, and he had some reports—I don't know whether they were phony or not—I've always wondered about that—but he had some reports indicating that Boca was unsafe, and in the case of a hundred-year flood, Boca could break, could fail, and would cause enormous damage. And in fact, I think in the late '50s there had been severe flood damage in Reno and Sparks. So that was part of also the pressure for Stampede. So Udall said, "Alright, the best way to protect Boca is to build Stampede above it." So he'll do that, he'll do it for flood control purposes, but he won't enter any water supply contracts until the Pyramid Lake mess is resolved. Little did he know, I think, that it was going to be (chuckles) a long time before Pyramid Lake was resolved. So Stampede was built between 1966 and 1970. The Marble Bluff

facility, which is an important facility and was also made possible by Senator Bible as Chairman of the Appropriations Committee, was completed in 1976. And so the result of Udall's decision was that Stampede Reservoir, from the time of its completion, was operated exclusively for the benefit of Pyramid Lake, because he didn't enter into any contracts with anybody else—specifically, Sierra Pacific Power Company, which looked on Stampede as being “theirs,” and that it was built *for* them, and that it was going to be their source of water forevermore.

So it got to be the mid 1970s, and Sierra Pacific kept saying, “When are you going to enter into a contract with us for this water?” The State of Nevada kept saying, “When?” And the Interior Department said, “We can't. We won't. We'll stick by Udall's decision, we're not going to do it.” In about 1976 or thereabouts, Sierra Pacific Power Company, the State of Nevada, and this other entity called the Carson-Truckee Water District, which was supposed to be the contracting entity for Stampede.

Seney: For Stampede or Watasheamu?

When Interior Was Sued for Not Negotiating Water Contracts for Stampede Reservoir the Courts Supported Interior, Ultimately Arguing That Sending Water to Pyramid Lake under the Endangered Species Act Was Appropriate Use of the Water

Pelcyger: Both. Sierra Pacific is a private company, and so the policy was to contract with a public entity, so they were the public entity that was created. They would basically subcontract with Sierra Pacific. So they filed suit against the Secretary of the Interior, claiming that the Secretary was obligated under the Washoe Project Act to enter into a contract with them. The tribe intervened in that case, and we won. In that case, it was assigned to a visiting judge from Oregon, Judge Gus Solomon—and there are a lot of colorful stories to tell about the trial of that case—but Sierra Pacific had this kind of highfalutin San Francisco attorney and he didn't get along at all with Judge Solomon, who was a very down-to-earth guy. In any event, Judge Solomon ruled against them in about 1982. So that was important, that was also before the Supreme Court decision. And then the Ninth Circuit affirmed Judge Solomon's decision in 1984, around the same time as the T-C-I-D decision. The Supreme Court also denied cert. The basis of those decisions, Judge Solomon's decision and the Ninth Circuit's decision, was the Endangered Species Act. And they said that even though the Washoe Project Act contemplated that this water would be sold for municipal use in Reno and Sparks, the Endangered Species Act overrode that and took precedence, which was passed in its current form in 1973, after Stampede was built; and that under the Endangered Species Act, the highest priority was to be given to endangered species, and therefore that the Secretary was certainly authorized, if not required, to use Stampede as he had been using it for the benefit of Pyramid Lake, and not to contract with Sierra Pacific. I can't overestimate the importance of that decision.

Seney: That really changed the standing of the Pyramid Lake Paiute Tribe, in all these water disputes, didn't it, on the Truckee?

The Stampede Reservoir decision was a major turning point which began the shifting of alliances so that “. . . instead of it being . . . everybody against the tribe, it’s now pretty much turned completely around so it’s now everybody against T-C-I-D. . . .”

Pelcyger: It changed everything. And it ultimately created [the major] political alliances, the tribe with the Sierra Pacific Power Company. And ultimately what it led to was instead of it being the situation on the Truckee River and Carson River of everybody against the tribe, it’s now pretty much turned completely around so it’s now everybody against T-C-I-D. And I think the major turning point was the Stampede decision.

Seney: Why don’t you go ahead and talk about the Preliminary Settlement Agreement.

The Compact for the Truckee, Carson, and Walker Rivers

Pelcyger: Well, first we have to talk about the compact.

Seney: Oh, alright, okay, let’s talk about the compact.

Pelcyger: The major thing

Seney: Actually, Bob, you talk about it the way you want, because obviously you have it well organized in your mind, so don’t let me interrupt. Go ahead.

Pelcyger: I need to know what’s on your mind too.

Seney: Well, if you don’t cover some things I want covered, we’ll do that at the end, but you go ahead, because you’ve obviously thought this out, and I want your thoughts here.

Sierra Pacific Power Company, Reno, and Sparks Saw Stampede Reservoirs Their Future Water Supply but When the Stampede Decision Went Against Them Sierra Pacific Saw It Had to Make Some Kind of Deal

Pelcyger: Up until the Stampede decision, Sierra Pacific—and Reno and Sparks, which is the major political constituency, certainly in Northern Nevada—believed that their future water supply was Stampede Reservoir. And that was why it was built, and that’s why they worked so hard to get it built. You probably have an understanding of this, but water in Nevada—and especially water in the West is very important, but there’s no community I’ve ever been in contact with or had experience with where it has assumed the magnitude that it has in both Reno and Sparks and Fallon. It’s mystical, it’s magical, it’s out of all proportion. And Sierra Pacific Power Company was obsessed with Stampede Reservoir. They have this fixation that “we know that there’s a limited water supply, and if we don’t assure the future water supply, our community is dead, it can’t grow any more.” So when the Stampede decision came down, it was—to them it was every bit as frightening, and as upsetting, and as sort of revolutionary as it was for the Pyramid Lake Paiute Tribe

to have lost its reserved water rights case—because they realized that the only way that they could get any help from Stampede Reservoir was now through Congress, and they could not do it, they were blocked in the courts, and that the Secretary *now*, as a result of *their* case, if not before, was actually precluded from doing it, even if he wanted to. So that basically meant that Sierra Pacific, ultimately—it didn't, I don't think, realize this right away—but ultimately it meant that it had to make a deal, and it brought us together. And I think in the history of this [entire situation], it's important to keep in mind that these legal decisions were extremely important in setting the parameters of what ultimately happened. I don't know that we would have been able to make a deal unless the courts had told us what the law was.

Development and Defeat of the Interstate Compact

Alright, so that happened in 1984 or thereabouts. And then we have the compact. Now the compact had been going on for a long time. Congress, back in 1955, had passed a joint resolution authorizing negotiations between the States of Nevada and California and the Federal government—not only on the Truckee River, but Lake Tahoe which is an interstate body of water and very politically important and sensitive, the Truckee River, the Carson River, and the Walker River. These negotiations were going on up through the '50s and the '60s, and they were just reaching a climax about the time that I started to get involved in this in 1969-, 1970. Throughout that period, the Federal government was ambivalent. The role of the Federal government was pretty much to allow the states to divide up—in these negotiations—to divide up the ante between them. It never asserted a position. This could have been a way to try to get more water for Pyramid Lake, or to overcome what had happened in the *Orr Ditch* case, but it was very passive.

“... the compact on the Truckee River was written in a way so that, again, everybody was satisfied at the expense of Pyramid Lake. . . .”

Meanwhile, the States of Nevada and California knew about the cloud hanging over everything by the Pyramid Lake Paiute Tribe's water rights in particular, and so the compact on the Truckee River was written in a way so that, again, everybody was satisfied at the expense of Pyramid Lake. And just like the proposal with Stampede and Watasheamu, which was going on at the same time, the compact was sort of integrated with that plan so as to result in, to make sure, that any additional use of water in either Nevada or California came at the expense of Pyramid Lake and nobody else.

“Everybody else was happy. . . . this proved to be its fatal flaw—they overreached. . . . the California-Nevada compact . . . said, ‘This compact would not be effective unless Congress in its ratification of the compact made it binding on the United States and Indian tribes.’ . . .”

Everybody else was happy. Not only did it do that, but the compact—and this proved to be its fatal flaw—they overreached. All previous [interstate] compacts—and this was part of the reason the Federal government sort of being a

bystander—the concept of an interstate compact is that it’s exactly that, it’s a compact between states. Now the Constitution says that compacts between states have to be ratified by the Federal government. But most interstate compacts at least had been, up until that point, agreements between states. And in fact the precedents on interstate water compacts where Indian water rights are involved, without, I think, without exception up until that time had been that the compacts included a provision that stated “nothing in this compact would affect the rights of the United States or its Indian wards,” [or words to that effect.] That’s a universally standard provision that was included in all of these compacts. But the California-Nevada compact included precisely the opposite provision: it said, “This compact would **not** be effective unless Congress in its ratification of the compact made it binding on the United States and Indian tribes.” And for that reason—and I’m not sure of the history, this would be interesting to kind of find out. Of course Reclamation at that time was the lead, most powerful agency within the Interior Department. I don’t know when that provision was added to the compact, I can’t tell you whether the Federal negotiators were proceeding under the assumption that the standard provision would be included, and then someplace toward the end it wasn’t or whatever, but in any event one of the last things that Stewart Udall did in January of 1969 as he was leaving office was write a letter to OMB [Office of Management and Budget] stating that the Interior Department opposed the compact, principally because of its adverse effect on Pyramid Lake, and citing that provision. So interestingly, the compact was negotiated then, at the time, between Nevada and California—who was the Governor of California? Ronald Reagan. Who was the Governor of Nevada? Paul Laxalt. This is where they met. It was especially important to Laxalt, because he felt like this was something that he had done as Governor, then he went to the Senate, and he really wanted to get it ratified before he left office—especially when he announced his retirement in 1986. What happened between ‘69 and the ‘80s was that the compact was introduced from time-to-time, but it was opposed as a result of Udall’s position.

Seney: Let me turn it over.

END SIDE 1, TAPE 1. SESSION II. SEPTEMBER 27, 1995.
BEGIN SIDE 2, TAPE 1. SESSION II. SEPTEMBER 27, 1995.

Pelcyger: The compact was opposed by the Justice and Interior Departments, as much as anything else because both Federal agencies, it was contrary to their interests to have the precedents set of states compacting between themselves, and then through Congress making the United States bound by that. That was not something that the Federal agencies wanted to see happen. So it never got anywhere. The compact was ratified by the two states, and members of the delegation from time-to-time introduced it, but I don’t even think ~~they~~ [Congress even] had a hearing on it. But then Laxalt, beginning in 1985, after the Stampede decision, Laxalt started to get interested in trying to do something with Truckee-Carson matters. Of course he was in an extremely powerful position: his best friend, Ronald Reagan, was President. I think Jim Watt was Secretary of the Interior, who he had really put there. So he was for all intents and purposes running the Federal government when it came to anything having to do with Nevada. So in 1985, in the aftermath of the

Supreme Court's decision in the *Pyramid Lake Reserve Rights Water* case, the T-C-I-D decision, and the Stampede decision, principally under the auspices of Laxalt, and through him, the Interior Department, there was an effort to try to reach a settlement, which included the compact.

Became the Tribe's General Counsel in 1985

At that time—I didn't become the tribe's general counsel until December of 1985—at that time, an attorney named Mike Thorp was the general counsel. I was in private practice, but I was still acting as special counsel, doing mostly litigation. Mike was involved in these settlement negotiations. Mike Thorp, incidentally—I don't know whether you're going to talk to him—but he's now in private practice in Tacoma, Washington. He was one of the young Justice Department attorneys who represented the United States in the Reserved Water Rights litigation, and then he went into private practice and ultimately the tribe—Bob Stitser terminated his relationship with the tribe, and Mike took his place. So there were these negotiations, very intense negotiations in 1985, and they turned out to be unsuccessful, and there were a lot of hard feelings and recriminations. Laxalt introduced a bill and there was mis-communication. The Pyramid Lake Paiute Tribe, which throughout this whole period, as I indicated had pretty much been a “Rock of Gibraltar,” politically, in terms of its stability and its strength, went to pieces during this period.

Tribal Chairman Died of a Heart Attack, Possibly Because of Internal Tribal Strife

The tribal chairman, probably as a result of the stress that he was subjected to—principally within the tribe, ~~people~~ [tribal members] opposed to a settlement or any concept of a settlement—had a heart attack and died suddenly, and his family is still very, very bitter about that *vis-à-vis* the dissidents within the tribe who were causing the commotion. Ultimately they circulated even a petition to fire Mike Thorp. Then he resigned, and that's how I got to be attorney. But there were a lot of bitter feelings about that.

Paul Laxalt Wanted the Compact to Be a Legacy and He Didn't Want Any Changes to it

The legislation did not pass. One of the critical factors in the legislation was that the Nevada parties and Laxalt were insistent that as part of any overall settlement that dealt with Stampede and dealt with T-C-I-D and dealt with these other issues, that the California-Nevada compact would have to be adopted “lock, stock, and barrel,” because it had already been passed by the two legislatures, and they didn't want to go back and mess around with it. And the tribe said “no,” or at least ultimately said “no.” There was some indication that it may have said something else earlier. But the other parties got very upset at the tribe, and there was a lot of bitterness resulting from it. That was '85, but it didn't go anywhere. So then '86 came, and Laxalt served notice in '86 that come hell or high water, he was going to retire, and so this was the last chance he would have, and that he *desperately* wanted to leave as his legacy some kind of resolution of the Pyramid Lake

controversy—which he referred to as being “the Middle East of western water disputes.” And this was his personal ambition.

Joe Ely as Pyramid Lake Tribal Chairman

So I became the tribe’s general counsel in 1985, and Joe Ely⁷ then became Tribal Chairman. He was about thirty years old, he was a high school dropout who came back and got his high school equivalency degree. He was on the council, but he emerged, almost from the ashes, to be this magnificent leader of the tribe in the time of its complete disarray, and after the sudden death of its chairman, amid tremendous acrimony and dissension.

Tribe Rejects Compact but Proposes a Proposal Around Which to Negotiate

There was a tribal referendum at the end of this, in which the tribe rejected the settlement as proposed by Laxalt, because, among other reasons, it included the compact, but said, “We’re willing to negotiate. We’re not rejecting negotiations. But this is what we want in any negotiation to achieve.” And so we began to try to kind of start over again in a very difficult atmosphere. And we did it by first of all putting together a proposal that we thought would work, spending a lot of time and effort on that, circulating it to the other parties, meeting with them, trying to meet their needs, trying to understand what [they wanted and needed and what] was happening.

Seney: This was after the compact had been killed?

Laxalt Was Determined to Have the Interstate Compact Ratified

Pelcyger: No, no, in 1985, this was after the broader settlement which included the compact didn’t pass. So we started to market, and really developed for the first time, a tribe settlement position—because previously, I think it’s fair to say, that Mike Thorp’s strategy had been to kind of play along. We couldn’t say “no,” that we didn’t want to settle it, because we would have just been creamed; but not with any real expectation that anything was going to happen.

“So we began to develop our own settlement proposal and shop it around, and Sierra Pacific was the only one that was interested, because of their Stampede problem. . . .”

So we began to develop our own settlement proposal and shop it around, and Sierra Pacific was the only one that was interested, because of their Stampede problem. So we began negotiating with Sierra Pacific and making some headway. [It] got to be about April or May of ‘86 and Laxalt’s term was going to expire, and Laxalt said, “I’ve had it, I’m not going to wait anymore.” So he introduced legislation to ratify the compact. Now this was when the Republicans were in control of Congress and Laxalt was on both the Appropriations Committee and the Judiciary

7. Joe Ely contributed to Reclamation’s oral history work on the Newlands Project.

Committee. Interstate compacts go to the Judiciary Committee. So it was introduced as a bill, it was referred to the Judiciary Committee, and there were hearings. We said to Laxalt and Sierra Pacific, "If you introduce the compact, then negotiations are off, because we are going to devote all of our time and effort to opposing the compact, and we're not going to be able to negotiate at the same time." Sierra Pacific, as I understand it, had tried to persuade Laxalt not to do it, but he was just hell bent that he was going to do it, before he left the senate. And he felt that the negotiations were going to get to the point where it'd be too late for him to do anything. So the Republicans were in control of the Congress and Laxalt was tremendously popular among his colleagues. He made it very clear to everybody that [as] his retirement present what he wanted was to get the compact through. And our slogan was "build him a library." (laughter) So literally, Joe and I dropped everything. I remember sitting with Laxalt and other members of the congressional delegation in a room like this in the Capitol, and Laxalt was probably one of the two or three most powerful men in the country, sitting across the table from Joe Ely and pointing his finger in his face and saying, "Now you listen to me. You're going to do things my way, or I'm going to ram this down your throat." And Joe Ely is a thirty-year-old guy who didn't say this to Laxalt, but said to himself, "Nobody treats me that way. I'm going to beat that son of a bitch."

Working to Defeat the Interstate Compact

Anyway, the tribe again was incredibly marvelous, notwithstanding the fact that everybody was against them. California and Nevada were both urging ratification of the compact.

Hired Both a Law Firm and a Lobbying Firm to Oppose the Compact

We decided to pull out all the stops to oppose it. And so Joe and I went back and we hired a lobbying firm. We interviewed different firms, and we made a decision to actually retain both a law firm and a lobbying firm.

Seney: Who did you hire for that?

Pelcyger: Well, we hired Anne Wexler and Dale Snape to be the lobbying firm; and an attorney named Burt Wides to be the attorney. Burt Wides was referred to us through Senator [Edward M.] Kennedy's staff. Senator Kennedy had personal involvement with Pyramid Lake, had been out to Pyramid Lake. In the early 1970s he was the chairman of a Judiciary subcommittee that was interested in the trust relationship and conflicts of interest, and so he knew about Pyramid Lake. He was the ranking Democrat, he had been the Chairman of the Judiciary Committee, and through his staff, they referred us to Burt Wides.

But the interesting thing was the lobbying firm. At that time it was a relatively new lobbying firm. It was called Wexler, Reynolds, Harrison, and Schule. Anne Wexler and Nancy Reynolds were the founders of the firm—two women. Anne Wexler was a very high-powered, very well-connected Democrat. She served in Carter's White House and had a high position in the Democratic

Party. Nancy Reynolds was one of the Reagans' best friends—especially Nancy Reagan's best friend. And these two women from opposite ends of the political spectrum basically got together and created this firm. Interestingly also, Nancy Reynolds had a major interest herself in Indians, especially Indian art, and she was also one of Paul Laxalt's best friends. So we hired the firm and the tribe said, "Pull out all the stops."

The Tribe Had a Grateful Dead Rock Concert on the Reservation to Raise \$65,000

I remember they had a rock concert on the reservation to raise \$65,000.

Seney: Was this the Grateful Dead concert?

Pelcyger: Yes, which they devoted completely to hiring the lobbying firm. So it was a very, very interesting time. We practically lived in Washington through the summer of '86. Strategically, Laxalt introduced this bill before the Judiciary Committee, there was a hearing before the Judiciary Committee, we spent a lot of time talking with all the staff and telling them why it was such a bad idea, and how it would kill Pyramid Lake, and how it was contrary to all the precedents. The Judiciary Committee, of course, even the Republicans on the Judiciary Committee wanted to, with every bone in their bodies, do a favor for Paul Laxalt, or carry out his wishes, recognized that there was a major problem here with this compact because it was so different than all of the others. In any event, the Judiciary Committee was very contentious at that time. There were four senators: Laxalt and Chic Hecht, who was his crony from Nevada, were both Republicans; and Pete Wilson from California was also a Republican. But Alan Cranston was the only Democrat from those two states, and Cranston opposed the compact, because of its adverse effect on Pyramid Lake. And so through Cranston, the Democrats were opposed to it. We also were working with Morris Udall in the House, as the Chairman of the House Interior Committee.

Seney: Well, that gave the Democrats some cover, doesn't it? If one of the senators of the two states, a Democrat, is opposed to it.

Pelcyger: Right. And most Democrats would mostly follow the lead of [Cranston].

Seney: If *all* the four senators had been in favor, that would have made things very difficult for you, wouldn't it?

Pelcyger: Right. But the Judiciary Committee had a long backlog of things to do, and judicial nominations, and it was clear that there was no way that something that was this controversial and contentious was going to get through the Judiciary Committee—especially with Cranston opposing it. We had some champions: Paul Simon was on the Judiciary Committee.

“ . . . there are a lot of mechanisms in the Senate to block things, and so they were pretty well stymied . . . But Laxalt . . . got a provision added-onto the Appropriations Bill that came through his subcommittee, just a one-liner saying,

‘Congress hereby ratifies the California-Nevada Interstate Compact.’ . . .”

Of course there are a lot of mechanisms in the Senate to block things, and so they were pretty well stymied there. But Laxalt, as I said, was also a member of the Appropriations Committee, and he was pretty senior. He was on the subcommittee that dealt with justice, commerce, or something-or-other. Anyway, without any advance warning, he, without any hearings or anything else, he got a provision added-onto the Appropriations Bill that came through his subcommittee, just a one-liner saying, “Congress hereby ratifies the California-Nevada Interstate Compact.” By the time we knew about it, it had already been reported out of the subcommittee. And that was the time also there was a Republican President, a Republican Senate, and a Democratic House, and I think it was [about this time] when the Iran-Contra [Hearings were going on].

Seney: It would have been about this time.

Pelcyger: Right about this time. The Reagan administration was weakened. The appropriation bills were all passed together. They were so contentious, and they were getting vetoed, so the only way they could do business and carry on the government—that was the time when the government was shutting down for a couple of weeks at a time, or at least several days, because they couldn’t get an appropriations bill passed—kind of like what we’re facing now. So appropriations bills were all put together in one giant bill called the Continuing Resolution or something, and it was that high.

Seney: You’re gesturing several feet high.

Role of Senator Hatfield of Oregon in Defeat of the Compact

Pelcyger: Yeah. And every powerful member of Congress tried to use those [bills] as vehicles for getting any other miscellaneous things through, because that was the only way to get legislation through that was at all controversial—just to tack it onto something that couldn’t be vetoed. So that’s what Laxalt’s strategy was. So of course we found out about it when it passed the subcommittee, and then we launched an all-out offensive to defeat that provision when it got to the full Appropriations Committee. I remember in particular that Senator [Mark] Hatfield from Oregon was the Chairman of the Appropriations Committee. He’s a very decent man, and he’s known as being pro-Indian. He was also, of course, close to Laxalt. And, probably because so much was going on in the Appropriations Committee and Hatfield was the Chairman of the Appropriations Committee, he was probably the second- or third-busiest man in Washington. But through our lobbyists, Joe Ely and I got an opportunity to visit with him—not just his staff, but with him. I remember that meeting very vividly. You should ask Joe Ely about it. He and Joe hit it off tremendously. They obviously came from very different places, but they had a common bond, a religious bond—Christianity was very important to both of them in their lives—and they hit it off, and we spent an hour-and-a-half or two hours with Hatfield. We started off by saying, “Senator, this compact is evil. And it is an attempt to totally undermine the Pyramid Lake, the

Pyramid Lake Paiute Tribe, the Pyramid Lake Reservation.” He said, “Do you mean to tell me that our President, Ronald Reagan, and my good friend Senator Laxalt engaged in such an effort when they were Governors of their States and this is what Senator Laxalt now wants ratified?” We said, “That’s exactly right, Senator.” And he said, “I can’t believe that.” And we said, “Well, that’s what we’re here to do, to show it to you.” So we had a map, and we had provisions of the compact. The compact is a very dense and difficult document to understand -- especially if you don’t know the geography. But we sat down—I remember that he went off to vote on the Senate floor and said, “Stay here. I don’t want you to go away. This is too important.” And by the end of the time, he was just shaking his head.

Seney: We were talking about Hatfield.

Pelcyger: Yeah. So we had this marvelous meeting with Hatfield.

Seney: He went to vote and came back?

Pelcyger: Went to vote and came back. I think *before* we had the meeting with him, the issue had come up in the full Senate Appropriations Committee, and there was a motion to delete the provision that was in the subcommittee’s, proposed bill, to ratify the compact. And the motion failed on a fourteen-fourteen vote. And I believe that Hatfield voted against us and in favor of [the compact]. Before we spoke to Hatfield, he had voted against us in favor of Laxalt. And Laxalt’s argument was something like, “This is the Federal government standing in the way. The states have all agreed to this.” Hatfield didn’t know anything about the Judiciary Committee or the precedent, he just basically took it on Laxalt’s word that this was some low-level Federal bureaucrat messing things up—government being bad. So then we met with him, and it was probably the most interesting meeting I’ve ever attended. But so now this bill, it was almost a straight party-line vote in the Appropriations Committee. We may have gotten a Republican or two. And I think Senator [Ernest] Hollings from South Carolina was the only Democrat who voted against us. But Cranston pretty well kept the Democrats.

So then it was going to come to the Senate floor, and we didn’t have any time, really, to mobilize between the time it came from the Subcommittee to the full committee, but we did have time to mobilize [before it came to the senate floor] and we worked every senator that we could. And at this point, this is where the lobbyists really earned their business, because most of the stuff they handle at committees, you only have to deal with one or two senators, and when it comes to a floor vote, it’s a hundred. And so we were passing out literature and meeting with staff. We found a champion in Senator [Bill] Bradley. There were nationwide editorials: there was an editorial in *The New York Times* about this, there was an editorial in *The Washington Post*, in *The Philadelphia Inquirer*, in the *Eugene Register-Guard*. The Senate got press releases.

Seney: This was the result of the public relations campaign?

Pelcyger: Yes. Everybody thought that Pyramid Lake was getting a raw deal. In fact, *The Washington Post* dug out an editorial that they had written about this right when the compact originally passed in 1970 or '71—or we dug it out for them—and then when it came up again, they referred back to their previous editorial, and Laxalt was getting trashed. There was a lot of press coverage also on the relationship between Laxalt and Reagan, the personal aspect of it. The *New York Times* did a story [with] a picture of Laxalt and Reagan with one of them's arm around the other with cowboy boots and cowboy hats, you know. And the [Reagan] administration was still opposing the compact, but was pretty weak about it. So it got a whole lot of interest from a lot of different angles. Everybody was in a uproar about Laxalt's tactics and the way they were trying to sneak this through and so forth. But he didn't care, he was retiring, and he just wanted to get this done.

Trying to Reach a Compromise with Laxalt on the Compact

But all this time, Dale Snape who's working with Nancy Reynolds, was saying that, "You know, Laxalt's modus operandi is that he's a compromiser. He doesn't really like to fight. And at some point along the way, there could be an opportunity for a compromise." So sure enough, the last week before it was scheduled to come to a vote, principally through the lobbying firm, we sat down to try to figure out if we could reach a deal. We didn't meet with Laxalt, we met with his staff person, Hal Furman, over a weekend. By the end of the weekend, we had a deal together. Of course everybody was encouraging us. Hatfield said, "Gee whiz, if you can . . ." And even though money was sort of tight at that time, this was an appropriations bill, so that meant that ordinarily, when you pass legislation, you first have to pass an authorization, and then an appropriation. The appropriation can be difficult. But here we were right in the appropriations process. Everybody wanted to do a favor for Laxalt, and it almost didn't matter how much money it costs, because if they could just do this in a way that would make the problem go away, it would be well worth it. So there was a lot of incentive, and we started to figure out [that] this could be an opportunity to really do something here.

"So we worked real hard . . . and we were going to get \$50 million for the benefit of Pyramid Lake. We had worked out a way to avoid the worst parts of the compact. We greatly expanded the bill. . . ."

So we worked real hard and we came up with something, and we were going to get \$50 million for the benefit of Pyramid Lake. We had worked out a way to avoid the worst parts of the compact. We greatly expanded the bill. The proposal was no longer going to be just the compact, there were going to be a lot of other things attached to it.

Senator Bill Bradley Was Going to Be the Tribe's Champion on the Floor of the Senate

Oh, our champion on this on the Senate floor was going to be Bill Bradley. And Bradley got interested in this on his own. He read the editorial in *The Washington Post*, and he was the ranking Democrat on the Water and Power

Subcommittee of the Senate Energy Committee, and so he had an interest in these matters, in water matters, by virtue of that position.

Senator Alan Cranston Offered Limited Support

And Cranston said, "I'll oppose the compact, and I'll do everything I can to keep the Democrats in line, but I'm not going to take on Paul Laxalt on the floor of the Senate on something like this when I don't know all of the details and don't have the time to learn about them." Cranston was the Senate minority whip, so he said, "I'm with you all the way, but there are limits. I'm not going to make a fool out of myself in front of my colleagues on something like this."

END SIDE 2, TAPE 1. SESSION II. SEPTEMBER 27, 1995.

BEGIN SIDE 1, TAPE 2. SESSION II. SEPTEMBER 27, 1995.

Seney: My name is Donald Seney, I'm talking to Robert S. Pelcyger in his office in Boulder, Colorado. It's September 27, 1995, and this is our second session and our second tape. Go ahead, Bob.

Senator Laxalt Reached a Deal with the Pyramid Lake Paiute Tribe Representatives but upon Consulting with the President of Sierra Pacific Power Company and the Head of the Nevada Department of Conservation and Natural Resources Was Told They Would Rather Have Nothing than the Deal, and Senator Laxalt Withdrew His Legislation

Pelcyger: So Bradley stepped forward. I remember getting a call from his staff person saying, "Senator Bradley read this editorial in *The Washington Post*. He thinks this is horrible and he wants to do whatever he can," which is unheard of! Usually I'm begging these guys to [help]. (laughs) And he was the only one who had the courage to take on Laxalt. So they were all getting ready for the floor fight and everything, and then at the last moment we reached a deal. I remember calling up Senator Bradley's staff person—who still works for him, Gene Peters—and telling him we had a deal, and he said, "Oh, that's too bad, I was really looking forward to it." (laughter) "Had my war paint on and everything," he said. But it turned out that we had a deal with Laxalt, but we were just negotiating with him, there were no other Nevada interests that were involved. On Sunday night I guess he called the President of Sierra Pacific Power Company [Joe Gremban] and the Nevada Head of the Department of Conservation and Natural Resources [Roland Westergard] and told them what he had agreed to with us, and they said, "Oh, that's awful! We'd rather have nothing than this deal!"

Seney: Would this have been Joe Gremban?

Pelcyger: Joe Gremban and Roland Westergard. And so they told Laxalt, "We'd rather have nothing." And so Laxalt just threw up his hands and said, "That's it, I'm out of here." And he then withdrew his provision.

Seney: Were you disappointed?

Pelcyger: Yes.

Seney: By this time you were happy with what you had?

“ . . . we felt that this was a golden opportunity that would never happen again. Here we could get \$50 million dollars and we felt we had neutralized the worst aspects of the compact. . . .”

Pelcyger: We were very happy, and we felt that this was a golden opportunity that would never happen again. Here we could get \$50 million dollars and we felt we had neutralized the worst aspects of the compact.

Seney: How had you neutralized those, do you recall?

Pelcyger: I can't remember exactly what we did. I think ultimately we got a much better deal out of it. We had language that would have said the compacts would be ratified, except so-and-so and so-and-so.

Seney: So you were happy, in other words.

Pelcyger: Yeah, we were happy. I remember vividly calling Joe Gremban. Have you interviewed him?

Seney: Yes, I have.

Pelcyger: I don't know whether he told you this, but I called him up. In fact, I came back to Boulder and I felt that we could still rescue it, after Laxalt had announced his intention to withdraw [the compact ratification provision]. And I said, "This is really stupid! You know you're never going to get an opportunity like this again! How could you" (laughter)

Seney: What did he say?

Impact of the Defeat of the Compact on the Political Standing of the Pyramid Lake Paiute Tribe

Pelcyger: He got angry. I think after that, negotiations resumed, he tried to convince Joe Ely that I shouldn't be included in the negotiations! (laughter) But no, I was convinced that that was something that we should do, that we were going to miss this golden opportunity.

“ . . . by the end of 1986 we had lost the *Reserved Rights* case, we had won the *Stampede* case, Sierra Pacific was convinced that they had to deal with us if they were ever going to get their hands on Stampede Reservoir. . . .”

But the end result of that was that by the end of 1986 we had lost the *Reserved Rights* case, we had won the *Stampede* case, Sierra Pacific was convinced that they had to deal with us if they were ever going to get their hands on Stampede

Reservoir.

“ . . . I think everybody realized that the compact was dead, especially because Laxalt was no longer in the Senate. If they couldn’t pass the compact with Laxalt as its champion in a Republican Senate, they *never* were going to . . . ”

We had shown the tribe’s power, and I think everybody realized that the compact was dead, especially because Laxalt was no longer in the Senate. If they couldn’t pass the compact with Laxalt as its champion in a Republican Senate, they *never* were going to do that.

Seney: Only you opposed it. That must have upped the tribe’s political standing considerably.

“ . . . most importantly of all, Harry Reid was elected to take Laxalt’s place, and the Democrats got control of the Senate in 1987. On election night in 1986 . . . a reporter stuck his microphone or notebook in front of Senator Reid and said—in Reno—‘What’s your highest priority?’ and Senator Reid said, ‘I want to settle the Truckee-Pyramid Lake water conflict.’ . . . ”

Pelcyger: Right. And we did everything: we brought videos back and showed it to staff in Congress, I mean, we really pulled out all the stops. And then most importantly of all, Harry Reid⁸ was elected to take Laxalt’s place, and the Democrats got control of the Senate in 1987. On election night in 1986, it was very interesting, because Reid is from Southern Nevada, his base is all Las Vegas. In fact, he was elected Senator, carrying only one of Nevada’s seventeen counties—or however many there are—which is Clark County, and that’s where Las Vegas is, that’s where all the population is, and that’s where his base is. But he really wanted to establish a reputation and a presence in Northern Nevada. He was a member of the House, so we had dealt with him. It was delicate, because he didn’t want to come out against the compact, but he helped us with Udall. Our ace in the hole was that even if it passed the Senate, Udall would be able to block it in the House. And Reid was—we never knew exactly what he was going to do about that, because he was running for office. But it never came to that, so we never had to call him. But when Reid was elected, it was a pretty narrow victory. It was a bitter campaign, he ran against Jim Santini who had been a Democrat and had been in the House of Representatives [and had recently converted to the Republican Party]. He was, again, Laxalt’s hand-picked guy. It was a very bitter campaign. But the night of the election, there was a celebration, and at a party a reporter stuck his microphone or notebook in front of Senator Reid and said—in Reno—“What’s your highest priority?” and Senator Reid said, “I want to settle the Truckee-Pyramid Lake water conflict.” And I don’t know if he had thought about that before but that was a commitment that he made. Part of it, I think, to the extent he thought about it, or to the extent that it just came out, it was partly because he knew that it was a very important issue in Northern Nevada and had high visibility. And I think also it was that he wanted to succeed where Laxalt had failed.

8. Senator Harry Reid participated in Reclamation’s oral history work on the Newlands Project.

Seney: I've heard that mentioned as incentive.

The Preliminary Settlement Agreement with Sierra Pacific Power and Senator Reid's Role in Facilitating That Agreement

Pelcyger: Yeah. And Reid had run for the Senate against Laxalt in '74, I think it was, and it was the only time that he had ever been defeated by 600-800 votes or something like that. And so he had this personal thing with Laxalt as well.

"So the dynamic had completely changed by 1987, and we began to develop a close relationship with Senator Reid, especially through Joe Ely, and they hit it off right away. And Senator Reid really totally changed the dynamic, in many ways. . . ."

So the dynamic had completely changed by 1987, and we began to develop a close relationship with Senator Reid, especially through Joe Ely, and they hit it off right away. And Senator Reid really totally changed the dynamic, in many ways.

Laxalt Generally Opposed What the Tribe Wanted and Sought to Force Them to Agree to Others' Wishes

Just to give you an example: when we would sit down and negotiate under the auspices of Laxalt, Sierra Pacific or the State of Nevada, or whomever else would say, "This is what we want," T-C-I-D would say, "This is what we want," and we would say, "No." And Laxalt, or more typically his person, would try to join with the others in trying to ram it down the tribe's throat. There was never any attempt to use his influence in a statesmanlike way to try to be a facilitator or use his enormous power and presence to really facilitate or broker an agreement. It was always, "Do it their way, or else I'll ram it down your throat."

With Senator Reid and His Staff the Tribe Was Able to Open a Dialogue with Sierra Pacific about the Real Needs of the Power Company and Storage of Water in Stampede Reservoir Resulting in the Preliminary Settlement Agreement

Reid, when he came in, completely changed the nature of the dialogue. For example, we would sit down with Sierra Pacific, Sierra Pacific's position is, "We want half of Stampede Reservoir for our M&I [municipal and industrial] supply, that's what we were promised, that's what we need for our future growth." So we would say to them, "Well, when do you need the Stampede water?" So I remember there was a famous graph that Sierra Pacific developed in which it showed that they would be able to meet not only their current demands, but their future demands fifty or a hundred years from now, except in only a very few years. I remember circling on a graph: 1934, 1932. In the eighty-eight years of history for which they had records, they go back and reconstruct what the flows would have been in each of those years, there are only a handful where they actually needed water from Stampede Reservoir. So we would say to Sierra Pacific, "Well, we don't think you need Stampede to meet these needs here. There are other ways to do that. You don't need half of the reservoir. Stampede is the only reservoir that's benefitting

Pyramid Lake. We obviously realize that if there's going to be a settlement here, it's got to meet your needs as well as ours, but it's ridiculous to take this 200,000 acre-foot reservoir and devote half of its capacity to meeting Sierra Pacific's needs in five years out of a hundred. That just doesn't make any sense, when it's so important to us, and taking half of the capacity away would have such an adverse effect." So with Senator Reid there, him or his staff would say, "Well, what do you propose then, tribe, to meet Sierra [Pacific's needs]." And then we came up with a proposal. The proposal eventually was: Instead of taking the *water* from Stampede Reservoir which was being used for Pyramid Lake, instead, utilize the *space* in Stampede Reservoir to store Sierra Pacific's water. In wet years, Sierra Pacific had *more* than enough water to meet its needs, so we'd be able to store that in Stampede and hold it 'til the drought, and then use that in the drought. It would more than cover all those five or six or a dozen years that they needed it, without taking a drop of the water that was dedicated to Pyramid Lake. So we came up with that, only because of Reid's [help]. This is a classic example of negotiation strategy or how dialogue can produce results. We never even got to that point, as long as Laxalt was there saying, "If you don't agree to their proposal, I'll ram it down your throat." Reid really, and his staff, to their everlasting credit, and probably the first publicly-elected figure in Nevada to do that, *listened*, and opened up a dialogue, and the dialogue is still continuing. But that's what led to the breakthrough, and he really deserves enormous credit.

Seney: That's the Preliminary Settlement Agreement, isn't it? (Pelcyger: Right.) That they have storage rights in Stampede.

Pelcyger: Right. And in return for that, we were able to really come up with a classic win-win situation, because the Federal government—this was an odd situation—these negotiations were taking place between the tribe and Sierra Pacific Power Company.

Seney: Over a Federal reservoir.

“ . . . ultimately, although the Federal government, at least employees of the Federal government, were very angry and upset that we were doing this when this was their reservoir, ultimately they came along. . . . ”

Pelcyger: Over a Federal reservoir, right. We had some reason for that, because we had won the *Stampede* case, so the reservoir was being used for threatened and endangered species, and the tribe's interest was in furthering threatened and endangered species [protection]. But basically we said, "Okay, what'll you give us, the tribe, in return for the use of the Federal reservoir?" And ultimately, although the Federal government, at least employees of the Federal government, were very angry and upset that we were doing this when this was their (chuckles) reservoir, ultimately they came along.

Seney: Am I right in thinking the tribe's incentive in dealing with Sierra Pacific Power, even though the court said they had a *right* to Stampede, was to stabilize the situation, in the sense that now you've got an alliance with Sierra Pacific Power

over Stampede, you get the *cui-ui* recovery water, they get the drought protection water, and the situation is pretty much settled as far as Stampede is concerned?

Elements of the Preliminary Settlement Agreement

The Tribe Gave up No Stampede Water in the Settlement Agreement

Pelcyger: Well, more than the stability, the Preliminary Settlement Agreement is a great benefit to Pyramid Lake, because first of all, we kept what we had, which was the Stampede water. We didn't give up any of that water.

“ . . . in addition to that, we got some very valuable things from Sierra Pacific: one of them was that Sierra Pacific's extra water, a lot of which had previously been diverted by T-C-I-D, would now go into Stampede. . . . ”

But in addition to that, we got some very valuable things from Sierra Pacific: one of them was that Sierra Pacific's extra water, a lot of which had previously been diverted by T-C-I-D, would now go into Stampede.

Sierra Pacific water could “ . . . build up to a . . . certain amount, . . . it would be turned over and become fish water. . . . ”

It would build up to a drought supply of a certain amount, which was key to what their demand was, but once it exceeded that, it would be turned over and become fish water. So instead of their getting Stampede water, we got some of *their* water, which had previously gone to T-C-I-D.

Sierra Pacific Agreed to Install Water Meters for its Customers

Even *more* significantly, they also agreed to put [in] water meters, and water meters were a big problem [relative to] conservation. There are a lot of benefits, but the major one was—and this requires some understanding of the Truckee River and its history.

How the Floriston Rates Were Involved in the Issues

Do you know about the Floriston Rates? Okay. Well, Truckee River, here we have this magnificent ecosystem, as these things go, a very small river, incredible, starting up at the lake up in the mountains, magnificently beautiful lake, going only a hundred miles or so, and winding up in a magnificent desert lake. And this whole system has been run for a hundred years, and the ecosystem practically destroyed, to produce a minuscule amount of power. But the power was one of the first things that was done on the river, and so all of the decrees and everything are built upon the operation of these reservoirs, especially Lake Tahoe, which stores the most water, in order to generate power. Now at the time, the turn of the century, the hydroelectric plants probably were generating ninety percent of the power that was used in Reno-Sparks. By the time 1990 comes along, it's less than one-half of one percent, but yet the whole river is being run . . . [intercom interrupts, tape turned off

and on]

Seney: The Floriston Rates were what demanded that year-round (Pelcyger: Right.) a certain level of water flow through the Truckee River whether it was needed or not for any other purpose except electric generation.

Pelcyger: Right. And the Floriston Rates totally altered the natural regime of the river. The natural regime of the river was that most of the water flowed into Pyramid Lake during the spring and summer when the snow was melting. And as you indicate, the Floriston Rates basically evened-out the flow so they could generate hydroelectric power the year-round. Now, up until 1967, when water was released to maintain the Floriston Rates and generated power for Sierra Pacific, it also was diverted at Derby Dam and generated power by T-C-I-D. But that stopped in 1967. So we were fortunate here because although the amount of power that was involved is very small, it was very cheap. And so Sierra Pacific, which is a private utility, made money off of it. But Sierra Pacific, in addition to being the power utility was also the water utility. It was very fortuitous that the same entity had both of these interests. And ultimately Sierra Pacific saw that its long-term interests were in improving its water supply and making it dependable. Because if there wasn't an adequate water supply for Reno and Sparks, they wouldn't be able to sell much more power. You know, they're a growth industry.

Sierra Pacific Relinquished its Right to the Floriston Rates Permitting the Water to Be Stored in the Fall and Winter and Released During Cui-ui Spawning—thus Replicating More Natural River Flows

So the key, from our standpoint, the key provision of the Preliminary Settlement Agreement was that Sierra Pacific relinquished its right to the Floriston Rates, to require the Floriston Rates for the generation of power. So that when that goes into effect—and we're actually doing it right now, even as we speak—this will be the first year, I think, that we're doing that—instead of all this water being released during the fall and the winter when it would *not* naturally flow, and it was not part of the natural ecosystem, it would be held back in storage.

Seney: And when it doesn't help the *cui-ui*.

Pelcyger: And when it doesn't help the *cui-ui*. It flows into Pyramid Lake, which is important, to maintain the level of the lake. But we get a much *greater* benefit if it flows into Pyramid Lake at the time the *cui-ui* are spawning, which is when ~~it did~~ *naturally* [the water flowed under natural conditions]. Our whole effort is to try to return to a more natural state. So by Sierra Pacific waiving its right to call on this water for hydroelectric purposes, when nobody else was using it, keeping that water in storage, that water then became fish water. And actually, the effect of it is to create another Stampede Reservoir on the system, we would get double the benefits of Stampede.

“... modification of the Floriston Rates benefits the fish as much as Stampede Reservoir does. And then, in addition to that, as you point out, the preliminary

settlement altered the whole political dynamic, and so there were major benefits there too. . . .”

This modification of the Floriston Rates benefits the fish as much as Stampede Reservoir does. And then, in addition to that, as you point out, the preliminary settlement altered the whole political dynamic, and so there were major benefits there too. But the agreement itself, from the water standpoint—in Reno and Sparks everybody looked at it as saying, “Oh, the tribe got water meters.”

“ . . . the most important thing was the modification of the Floriston Rates. And the flexibility that we would have to operate the reservoirs . . . because the Floriston Rates . . . very inflexible system, and caused all kinds of problems . . . ”

Well, water meters were the symbolic issue, and to some extent it’s important, but the most important thing was the [modification of the] Floriston Rates. And the flexibility that we would have to operate the reservoirs to optimize them, because the Floriston Rates really were a very rigid, very inflexible system, and caused all kinds of problems—where now the last two days I came back from meetings, we’re in the process of doing an EIS on the TROA Agreement [Truckee River Operating Agreement].

Seney: Were you up for a TROA meeting?

Pelcyger: Yeah, which is basically carrying out the Preliminary Settlement Agreement. And they’re discovering all kinds of things that they can do, including maintaining more optimum levels in the reservoirs, maintaining instream flows in California and the various tributaries, the Little Truckee and Prosser Creek and Independence Creek.

“The critical thing was to break the stranglehold that the Floriston Rates imposed on the system, which were extremely rigid, and which were counter to the natural stream regime. . . .”

The critical thing was to break the stranglehold that the Floriston Rates imposed on the system, which were extremely rigid, and which were counter to the natural stream regime.

Nevada Was Interested Because it Was Concerned it Might Lost the Water Allocation Between California and Nevada on the Truckee and Carson Rivers

And so that was the critical political breakthrough as well, because then Sierra Pacific and the tribe became allies, and then we were able to, kind of through a miracle, get the State of Nevada as well to have a stake in this, because the State of Nevada, its biggest concern has always been the interstate issues against California. The state wanted that compact because their nightmare is that this colossus, California, will one day awaken and take back the Truckee River and the Carson River from politically impotent Nevada, because California is such a political heavyweight.

Seney: Well, California *hasn't* exercised all of its rights on those watersheds, has it?

Pelcyger: Well, I don't know about its rights, but in all those watersheds, the headwaters are in California, but it's mostly mountainous area, it's mostly national forest, and most of the uses are in Nevada as the downstream state. But Nevada lives in absolute fear that one day California is going to wake up and dig a tunnel from Lake Tahoe to Los Angeles, or something. (laughter)

“ . . . this compact has always been their principal objective . . . we also needed to have . . . we called it an interstate allocation. . . . it's interesting, because the interstate allocation will be done by statute, as opposed to by interstate compact. . . . ”

So this compact has always been their principal objective, and so when we realized that if we were going to have a settlement, we needed to have a deal with Sierra Pacific, we also needed to have an—we called it an interstate allocation. Joe Ely was very clear on this. He said, “Don't let me hear the word ‘compact.’ Compact is a political dirty word for me on the reservation. Everybody [on the Pyramid Lake Reservation] hates the compact, so don't mention it. But we can talk about an interstate allocation.” And this time it's interesting, because the interstate allocation will be done by statute, as opposed to by interstate compact.

Seney: So now we're getting to [Public Law] 101-618.

Origins of Public Law 101-618

Pelcyger: Right, which was what the Preliminary Settlement led us to. So ultimately we were able to take the compact as a starting point, but eliminate those features which were so harmful to Pyramid Lake, so detrimental to Pyramid Lake, and recast it as an interstate allocation. We eliminated the Walker River and we just included Lake Tahoe, the Truckee, and the Carson. And Lake Tahoe was really the key part of that, because the allocation that the states had agreed to on Lake Tahoe was a part of the land use planning and part of the growth control, and it's the most environmentally sensitive area and very important and sensitive politically.

“ . . . both states, even in the absence of the compact, have bound themselves to the allocation. . . . ”

And So we kept that allocation and kept some other features of the compact, but eliminated the ones that were most detrimental to Pyramid Lake, and in the process we got Nevada and California on board. And then T-C-I-D became isolated.

Seney: And this 101-618 you regard as a great boon to the tribe, I take it?

Pelcyger: Yes.

Seney: Success.

Pelcyger: Yes.

Seney: You're really smiling now. (laughter) You smile a lot, but you're really smiling now.

Pelcyger: Well, doesn't everybody?! (laughter) Did anybody tell you that it wasn't?

Seney: No, no. But I do want you to say that here, because others will read this later on, and I want them to be sure that that's your feeling too, that this was a real success and a victory for the tribe.

Pelcyger: Yes, my feeling is that in the end of the day, and now building on the breakthroughs and the political alliances and the credibility and the respect that was achieved through first the litigation and then the Settlement, that as a result of all that—including financially, because there were financial provisions.

Seney: Right, the tribe got an endowment and some economic development funds.

“ . . . they got a land exchange . . . the best land within the reservation that had been owned by non-Indians has now been returned to the tribe . . . They got the bed and banks of Pyramid Lake. . . . the end result, in my judgment, is that the tribe . . . will be far, far, far better off as a result of 101-618 and its aftermath, as opposed to where it would have been if we had won the Supreme Court case . . . ”

Pelcyger: Right, and they got a land exchange, and they got several thousand of the best acres, the best land within the reservation that had been owned by non-Indians has now been returned to the tribe through a land exchange. They got the bed and banks of Pyramid Lake. But the end result, in my judgment, is that the tribe, in the end of the day, will be far, far, far better off as a result of 101-618 and its aftermath, as opposed to where it would have been if we had won the Supreme Court case, for example.

Seney: Right. Do you want to say anything more about 101-618?

Pelcyger: Well, let me just talk to you a little bit about the Newlands Project aspect of it.

Seney: Yeah, great.

Recoupment

Pelcyger: And that gets us to recoupment as well.

Seney: Okay, good. And then I want to talk to you a little bit about Settlement II. If you can give me another half-an-hour, we'll be finished—maybe. (Pelcyger laughs) I might take that back.

Pelcyger: Okay. (laughter) I understand. I make these promises too. Say three-thirty?

Seney: Yeah, okay, max, three-thirty.

The Negotiations Leading to Public Law 101-618

Senator Reid Kept Some Staff Busy Just Getting up to Speed on the Issues on the Truckee River and TCID

Pelcyger: Okay. Well, when we went to Congress—and again, Senator Reid, I can't overestimate his dedication to this. For the first year, he had a couple of staff people working almost full-time on this, without any meetings or anything, just getting up to speed so that they would be conversant with the issues and going out and talking to Federal employees, Fish and Wildlife Service, Bureau of Reclamation.

Seney: This is before 101-618 was even put in the hopper.

Pelcyger: Right. **Long** before, ~~before~~ there were any negotiations. He was elected and took office in January of '87. I don't think we had our first meeting until late fall or early winter of '87.

Seney: So you're talking about people on his staff like Wayne Mehl.

Pelcyger: Wayne Mehl—principally Wayne Mehl.⁹ Have you talked to Wayne?

Seney: Not yet, but I will when I go to Washington in a couple of weeks.

Pelcyger: I remember Wayne telling me early-on, he said, "I couldn't believe it! I went out to Reno and I talked to the Fish and Wildlife people and I talked to the Reclamation people, and they don't talk to each other, they hate each other! They consider everything that comes out of the other's mouth to be a lie." Which was true. They all worked for the same agency, and they were not only not cooperating, but not even communicating. And Wayne is a real hero in this, and he came in knowing little or nothing. Of course they hate him at T-C-I-D, feel that he became a partisan for Pyramid Lake.

Seney: Did he? Was he very helpful to you?

The Role of TCID in the Settlement Negotiations

Pelcyger: Oh, he **was** helpful, yeah. And T-C-I-D ultimately, of course, as you know, opposed the legislation. What I wanted to tell you is kind of a political science lesson as well. When the legislation was introduced by Senator Reid, I think it was broken up into three or four or five titles: there was an interstate allocation, there was the TROA provision which implemented the Preliminary Settlement Agreement, there was a provision about wetlands—we haven't talked about that. I guess I should mention something about wetlands, especially Joe Ely's role, so you

9. Wayne Mehl contributed to Reclamation's oral history work on the Newlands Project.

can talk to him about that. And there was an economic development fund for Pyramid Lake. But the statute was absolutely silent on the Newlands Project, which was a big gap. Of course everybody realized that it was a major issue. But we weren't able to achieve a settlement on it, and Senator Reid said that he was only going to go ahead with those portions that we were able to reach agreement or consensus on. He wasn't going to ram anything down anybody's throat. In fact, we really had a moment of truth, the real moment of truth and difficulty in the 101-618 negotiations was when the negotiations broke down with T-C-I-D and we realized that we weren't going to get a settlement, whether we would continue without them. And recollections differ on this, but at the time, when we reached an impasse, and I can tell you what that impasse was about in a minute if you want to know. But at the time, everything was open and above board and T-C-I-D was very gracious and they came into a meeting and said, "Look, we understand your position, you understand our position. We really feel like this is a fundamental principle with us, we can't compromise it, and much as we'd like to, we can't reach a settlement."

Seney: Let me turn this over.

END SIDE 1, TAPE 2. SESSION II. SEPTEMBER 27, 1995.

BEGIN SIDE 2, TAPE 2. SESSION II. SEPTEMBER 27, 1995.

Ted deBraga Said There Were Legitimate Disagreements about the Settlement Negotiations and That They Should Proceed but Then TCID Vehemently Opposed Passage of the Settlement Legislation

Pelcyger: But T-C-I-D said, Ted de Braga said—he doesn't recall it this way, but I know it's true, and I specifically recall, and so does Wayne Mehl—Ted said, "Look, just because we haven't reached an agreement on the issues between the tribe and T-C-I-D doesn't mean that you ought to call everything off. On the contrary, we think you guys should continue." This was at the time when we had a Preliminary Settlement Agreement, but not yet an interstate allocation. He said, you know, "You should pursue it and we realize that there'll be more litigation, but we understand the tribe isn't prepared and we're not prepared to compromise on this point, and so that's what courts are for, so we'll just have to litigate that. But by all means, proceed and see what you can get done." So we did. Previously, the State of Nevada, Roland Westergard, had publicly stated "all Nevadans," which excluded the tribe, "have to stand together, we all rise or fall together." And it was a real question whether, politically, Senator Reid could proceed without the Newlands Project piece. But he did, and ultimately we got Nevada and California involved, and they became stake-holders, and they got to have an interest in it. Ordinarily the State of Nevada would have, in those days, certainly sided with T-C-I-D. But they so desperately wanted the compact, and they realized the only way they were going to get this compact or this interstate allocation was through the legislation, that that overcame their political loyalties to T-C-I-D. So that was a real moment of truth.

Seney: T-C-I-D *does* say that there was something slipped into that legislation.

“I think when Ted de Braga and T-C-I-D said, ‘Look, you guys proceed without us,’ they never expected that we were going to be able to reach an agreement—much to their surprise we did. Then they found themselves outside looking in, and they panicked. They launched a campaign against the settlement, after it had been introduced, when it was neutral as to T-C-I-D’s interests. . . .”

Pelcyger: Well, that’s right, and I’m getting to that. The original draft of the legislation was absolutely silent on T-C-I-D. I think when Ted de Braga and T-C-I-D said, “Look, you guys proceed without us,” they never expected that we were going to be able to reach an agreement—much to their surprise we did. Then they found themselves outside looking in, and they panicked. They launched a campaign against the settlement, after it had been introduced, when it was neutral as to T-C-I-D’s interests. And they had a march from Reno down to Carson City and they hung Senator Reid in effigy. Keep in mind now Senator Reid was viewed in their eyes as being an Indian lover and *cui-ui* lover, and all these things. For a hundred years they had gotten everything they wanted to. I analogize it to asking an Indian tribe to renegotiate a treaty. This was a fantastic change in a very short period of time. So for whatever reasons, they launched an all-out campaign against Senator Reid and against the legislation.

At the Hearings on the Settlement Act Legislation Both TCID and Reclamation Testified Against the Legislation

They testified against it. They came back before Congress and testified against it. And actually, the Federal government testified against it at the same time, through the Bureau of Reclamation, primarily John Sayre [Assistant Secretary of the Interior for Water and Science]. I don’t know if you’ve read those hearings.

Seney: Yes, I have. That was a disaster.

Pelcyger: Absolute disaster. Their basic point was this isn’t really a settlement, because how could you have a settlement without T-C-I-D? The biggest piece of the puzzle was left out. So Senator Bradley said at the hearing—and they also got the Fallon [Paiute Shoshone] Tribe to oppose it, which is another whole story—so Senator Bradley said, “I’ll tell you what,”—this hearing was in February of 1990—“I won’t do anything with this legislation for ninety days, and you guys, I’ll leave that time for you to negotiate. But if you don’t reach an agreement, then we’re going to move this.”

“That’s . . . also when the Federal government’s position began to change, because Sayer’s performance was so atrocious. Secretary of the Interior Manuel Lujan appointed Bill Bettenberg to be the Federal coordinator on all these matters, and then things began to change. . . .”

That’s, incidentally, also when the Federal government’s position began to change, because Sayer’s performance was so atrocious. [Secretary of the Interior Manuel]

Lujan appointed Bill Bettenberg¹⁰ to be the Federal coordinator on all these matters, and then things began to change. Bill is still involved. Have you talked to him?

Seney: I will interview him when I go to Washington.

“ . . . because T-C-I-D became so outspokenly opposed to the settlement, then all those provisions in it which T-C-I-D now finds so offensive, were added to it by Senator Bradley, with, I assume, a wink and a nod from Senator Reid. . . .”

Pelcyger: Bill played a very important role in this, and that’s at the time when we got the Federal government to become a party to the Preliminary Settlement Agreement. But what happened was because—in *my* judgement, this is *me* speaking now, nobody else—but because T-C-I-D became so outspokenly opposed to the settlement, then all those provisions in it which T-C-I-D now finds so offensive, were added to it by Senator Bradley, with, I assume, a wink and a nod from Senator Reid.

Seney: It wouldn’t have been in there without Senator Reid knowing about it.

Pelcyger: Certainly. Senator Bradley would not have [included it without Senator Reid knowing about it]. And you should probably talk to Tom Jensen.¹¹

Seney: I am going to see him too.

“So the moral of the story, at least with Senator Reid, is that when you cross him and you hang him in effigy, and you make him into a villain, you do so at your own peril. And all of those provisions in what’s now Section 209 of the Act were added afterwards. Originally the bill that Senator Reid introduced was neutral on the Newlands Project. . . .”

Pelcyger: So the moral of the story, at least with Senator Reid, is that when you cross him and you hang him in effigy, and you make him into a villain, you do so at your own peril. And all of those provisions in what’s now Section 209 of the Act were added afterwards. Originally the bill that Senator Reid introduced was neutral on the Newlands Project. We didn’t like some of those provisions either, I should say—especially the moratorium on OCAP litigation, because we felt that the 1988 OCAP were deficient in various ways, were not nearly as good as Judge Gesell’s OCAP, and we wanted to litigate that. But we were prevented from doing that by the moratorium. On the other hand, the recoupment provision directing the Secretary to pursue recoupment, providing incentives for recoupment [we liked].

Seney: That’s in 209?

“That’s in 209 . . . I’d say it was certainly a major blow to T-C-I-D, and one that I think they brought on themselves. . . .”

10. Bill Bettenberg contributed to Reclamation’s oral history work on the Newlands Project.

11. Tom Jensen participated in Reclamation’s oral history work on the Newlands Project.

Pelcyger: That's in 209, yeah. So all-in-all, I'd say it was certainly a major blow to T-C-I-D, and one that I think they brought on themselves.

Seney: Now, one of the things you wanted to talk about was the wetlands, (Pelcyger: Yes.) Public law [101-618] mandates 25,000 acres, on average, of wetlands. I know you're in a hurry, and I've taken four hours of your time, so I don't think that's inappropriate. But I do want to [ask you] to say [something] about the wetlands.

The Wetlands

Pelcyger: The wetlands were an absolutely critical part of this.

“One of the major obstacles that the tribe faced in reducing Truckee River diversions to the Newlands Project, and in our whole effort to make the Newlands Project more efficient, was the adverse affect of that on the Lahontan Valley wetlands. . . .”

One of the major obstacles that the tribe faced in reducing Truckee River diversions to the Newlands Project, and in our whole effort to make the Newlands Project more efficient, was the adverse affect of that on the Lahontan Valley wetlands. And I can't overestimate the significance of that.

There Are Three Major Wetlands in the Area: Fallon Wildlife Refuge, Stillwater National Wildlife Refuge, and the Carson Lake Pasture That Exist on Return Flows and Waste Water from the Newlands Project

As you know, there was a wildlife refuge, the Fallon Wildlife Refuge was created outside of Fallon, I forget when, in the '40s. And then the Stillwater Wildlife Management Area was a very important wildlife refuge, and an important stop on the Pacific Flyway. And the Stillwater Wildlife Management Area had no water rights. Also Carson Lake Pasture was an important wildlife area. Basically, they existed off of return flows and waste from the Newlands Projects. (Seney: Spills.) Spills. Basically the more inefficient the Newlands Project was, the more water they got.

“We had all these conflicts going on between the Bureau of Reclamation and the Bureau of Indian Affairs . . . the Fish and Wildlife Service . . .”

We had all these conflicts going on between the Bureau of Reclamation and the Bureau of Indian Affairs. And the Fish and Wildlife Service was charged on the one hand with carrying out the Endangered Species Act, and there are people in the Fish and Wildlife Service who are extremely dedicated to doing that, and have worked very hard to do that for the benefit of Pyramid Lake—especially its threatened and endangered species. But another part of the Fish and Wildlife Service runs and administers wildlife refuges and are just as strongly supportive of the Wildlife Refuge and the interests of the Wildlife Refuge. Indeed, in the early days of the OCAP, the Fish and Wildlife we referred to not-so-fondly as “the duck

people.” Inside the Fish and Wildlife Service, the refuge advocates were much more powerful. This was in the late ‘60s, before the Endangered Species Act came along. And even to this day they are extremely powerful, and there are conflicts that come up.

“ . . . whenever the Fish and Wildlife Service took a position on OCAP, they voted with Reclamation against the Bureau of Indian Affairs, because of their wetlands interests. . . . ”

But whenever the Fish and Wildlife Service took a position on OCAP, they voted with Reclamation against the Bureau of Indian Affairs, because of their wetlands interests. So it was a real problem. And the wetlands were getting an enormous amount of attention at this time. You remember the Kesterson crises?

Seney: Right, in California.

There Was Concern about Entrainment of Selenium and Other Elements in the Drainage Water at the Stillwater National Wildlife Refuge

Pelcyger: In California, Kesterson was a wildlife area, Wildlife Refuge, also that existed off of irrigation return flows, and which became contaminated with selenium. And that got the Bureau of Reclamation and the Fish and Wildlife Service very concerned and upset about the potential for Kesterson problems occurring elsewhere. And suspect number one on the list was Stillwater. So the Bureau of Reclamation and the U.S. Geological Service and the Fish and Wildlife Service created a task force to look into irrigation drainage problems elsewhere other than at Kesterson. They highlighted Stillwater, and sure enough, at the very same time—this was 1985, 1986, 1987—there got to be enormous problems that became apparent at Stillwater. There was a cover story in *USA Today* about a fish kill of tens of thousands of fish that they didn’t know what caused it. There were deformed birds, some of the same problems as at Kesterson. In fact, Stillwater was viewed as being the number two problem of this kind in the country—perhaps more complex than Kesterson, because at Kesterson it was just a selenium problem, whereas at Stillwater, it was selenium and cadmium and mercury and boron and all these elements interacted in ways that nobody really understood synergistically. So this was happening at the same time that all these other things were going on.

It Was Recognized That the Wetlands Needed Their Own Water Rights

It turned out to be very fortuitous, because it led to the recognition on the part of the wetlands advocates and the Fish and Wildlife Service that long-term or even short-term, they could not rely on return flows, and could not rely on spills and wastes—that they had to get their own water supply. Joe Ely was absolutely critical in overcoming the traditional animosities. And these were the environmental groups. You would ordinarily think Pyramid Lake, such a magnificent natural resource, endangered species and all that, that automatically all of the environmental groups would be on our side. Well, they weren’t, because they themselves had this tremendous conflict. And it was highlighted by the 1988

OCAP, because the 1988 OCAP, although not as strong as the 1973 OCAP, nevertheless required much more efficiency on the part of the Newlands Project. The biggest issue with regard to the OCAP came to be the adverse effect of the OCAP on the wetlands. And so there was a lot of pressure for mitigation, to mitigate the adverse effects of the OCAP. Senator Hecht—who was a one-term senator I’ve referred to previously as Senator Laxalt’s crony, who basically hand-picked him to run—succeeded in 1988 in getting appropriations included to buy water rights for the benefit of the wetlands. And Joe Ely had numerous meetings with wetlands advocates, including representatives of the Nevada Department of Wildlife, to convince them that it was really in their interest to get on board the settlement, to support—or at least not to oppose—the ‘88 OCAP, but to use that as a springboard to call on Congress to mitigate the adverse effects of the OCAP by providing funds for the purchase of water rights, which would be a primary right, not a secondary right.

Public Law 101-618 May Result in the Termination of the Newlands Project

And so, in that way we were able to—and because of that, because of the water quality issues involved with the wetlands—we were able to overcome this traditional adversarial relationship between the endangered species and the wetlands, and we were able to join forces so that all the environmental groups could, with a clear conscience and with a straight path, support the Settlement Act, because it resulted in the enhancement of both the endangered species through the Preliminary Settlement Agreement, and through the *cui-ui* recovery plan, and the lower river restoration plan with the Corps of Engineers, and at the same [time] set a goal of 25,000 acres of viable wetland habitat in the Lahontan Valley, and authorized and directed the Secretary of the Interior to obtain a water supply, through the acquisition of water rights *for* the wetlands. So the result of the legislation, one way of looking at the legislation, I think particularly significant for *your* purposes, is that it was, in a way—and we’ll see what happens—it was the first termination of a Federal Reclamation project. Newlands was the first Federal Reclamation project. And the Newlands Reclamation Project resulted in the near-destruction of two major ecosystems: Pyramid Lake and the [Lahontan Valley] wetlands.

“ . . . Congress has . . . provided for the eventual . . . termination of the Federal Reclamation project by providing for the water rights for the project to be acquired, for the water to be redirected back to their original ecosystems: Pyramid Lake and the [Lahontan Valley] wetlands. . . . ”

And now Congress has come along and basically provided for the eventual, I think, termination of the Federal Reclamation project by providing for the water rights for the project to be acquired, for the water to be redirected back to their original ecosystems: Pyramid Lake and the [Lahontan Valley] wetlands.

Seney: That’s a very interesting point, because what is it, 125,000 acre feet is what’s required to service that, give or take, for 25,000 acres of wetlands.

Pelcyger: Right, and some of that can come from drain flow, still—it doesn’t all have to be

primary. But it's a huge block. Then 101-618 also directs the Secretary of the Interior to develop and implement the *cui-ui* recovery plan and the recovery plan [that] was developed and approved in 1992 calls for an additional 100,000 acre feet of Truckee River water to flow to Pyramid Lake in order to achieve recovery of the *cui-ui*.

Seney: An additional over and above

Pelcyger: Over and above what Pyramid Lake is receiving, say, under the '88 OCAP, and with everything else in place in the river.

Seney: I see what you mean. So once that's implemented, and once the purchase goes into effect, the project's gone, essentially except for 20,000 or 30,000 acres, maybe.

Pelcyger: Maybe, right.

Seney: Maybe. Which was what it was before the project was there. (Pelcyger: Right.) There was 20,000 acres of agriculture. (pause) Anything else you want to add about 101-618?

“. . . 101-618 offered a far, far better opportunity for benefits than the deal [on the California Nevada compact] we thought we had with Laxalt. . . .”

Pelcyger: Well, other than that, I think I indicated from the tribe's standpoint, as I kept telling them during the process, “You don't often get the attention of Congress.” And it turned out that I was wrong, that 101-618 offered a far, far better opportunity for benefits than the deal we thought we had with Laxalt.

Seney: So your disappointment was premature in that regard.

Pelcyger: Well, my disappointment was wrong. (laughter) Things turned out better than I had ever dreamed possible.

Seney: Do you think Joe Ely deserves some credit for this?

Joe Ely

Pelcyger: Absolutely. No question about it.

Seney: He was the right man at the right time.

Pelcyger: He was a tremendous leader, and he was brilliant, and he combined all of the assets. He was respected internally within the tribe, and he was respected externally. He wouldn't make promises unless he knew he could deliver, and everything he promised he was able to deliver. He consulted broadly within the tribe. I think there was a problem when he left—the tribe has a restriction in its Constitution that prohibited him from running for a third term, a successive third term. And there was some disarray and dissension when he left. But there would be no 101-618

without Joe, no question.

THE OPPORTUNITY FOR PUBLIC LAW 101-618 WAS UNIQUE

But the point I was going to make also was that it *did* provide a tremendous opportunity, and so because we had the attention of Congress, and because it's a once-in-a-century opportunity, and because Senator Reid was as good as he was, and as good a friend to the tribe, not only Senator Reid, but Senator Bradley and Senator [Daniel K.] Inouye [of Hawaii]—we really were very fortunate, especially with those three—that we could include in the bill numerous other benefits, including an economic development fund, including an endowment for the fisheries program so they're not dependent on congressional appropriations, which we did anticipate that some day they would be cut. (Seney: We're in one of those days now.) Right. So ~~that's~~ [the fishery program is] self-supporting. The land exchange, under which the most valuable lands on the reservation [were returned]. The Pyramid Lake Reservation will probably be, or almost is now, perhaps the only large reservation in the country which is almost a hundred percent—I'd say it's now ninety-nine percent—tribally-owned land, no non-Indian fee land within the reservation, which is very, very important because of the sovereignty issues. And lands were added onto the reservation: the bed and banks of the Pyramid Lake and the Truckee River, which the State of Nevada had claimed under the Equal Footing Doctrine, was turned over to the tribe, or title was confirmed in the tribe. We got the State of Nevada to relinquish its claim to those beds and banks. Congress recognized the tribe's exclusive right to control hunting and fishing. Stampede Reservoir, which in the litigation basically the Secretary was directed to use for the benefit of Pyramid Lake as long as the species were threatened and endangered, under the legislation Stampede is permanently dedicated to the use of Pyramid Lake, regardless of the status of the fish. It was a tremendous opportunity, and I think we took full advantage of it.

Seney: Even though the political climate has changed in the Congress, both Houses now in Republican hands, I'm told that Congressman [Barbara] Vucanovich has told the T-C-I-D farmers, "Don't expect any changes in 101-618." Do you feel that way too, (Pelcyger: Yes.) that the legislation is secure? (Pelcyger: Yes.) What makes you think that?

Passage of Public Law 101-618 and Member of Congress Barbara Vucanovich

Pelcyger: Well, because everything is so interconnected, and because politically Reno and Sparks gained, Sierra Pacific Power Company gains, the State of Nevada gains, California gains, the Pyramid Lake Paiute Tribe gains, and the only opponent is T-C-I-D, and politically they just don't count, or rather they don't have the strength to overcome [the forces favoring the settlement]. And I think everybody, including T-C-I-D's natural friends like Congresswoman Vucanovich, recognize that change was overdue, and that it was not equitable for T-C-I-D--they couldn't continue to operate the way they were, and that while there's no question but that she is a friend and very sympathetic to the Fallon community, Reno and Sparks need the drought water supply, and there are a lot more people, (Seney: Have more votes.) and they

have the votes, and they have a lot more money. (laughter) In fact, I don't know whether you looked, but 101-618 passed at the very, very end of the Congress. It passed the Senate, and that's another whole story of how it passed, and eventually became Title II of the Fallon Settlement Act. But then it came to the House of Representatives, and even though at that time it was a Democratic House, Congress was about to adjourn and in the wee hours there were five bills that were left for consideration at two o'clock in the morning, and they were all leaving the next day, and most of them probably had already left. It was on the consent calendar, if any single congressperson had objected, it wouldn't have passed the House.

“... I think T-C-I-D asked Congresswoman Vucanovich to stop it, and she *could* have ... but she didn't, because I think she recognized that it was on the whole in the overall best interests of her constituents. ...”

And I think T-C-I-D asked Congresswoman Vucanovich to stop it, and she *could* have, even though she was in the minority then, but she didn't, because I think she recognized that it was on the whole in the overall best interests of her constituents.

Seney: Well Bob, why don't we end there for today? I've taken four hours of your time, and now you've promised to give me some more time, right?

Pelcyger: Yes. (chuckles)

Seney: I want to hear that on the tape! Alright.

Pelcyger: In Reno, right? (laughter)

Seney: Right, I'll come and meet you in Reno, and I'll make those arrangements. On behalf of the Bureau, I really appreciate your talking to me today, and I'll see you again soon.

Pelcyger: Well, it's been more fun than I expected. (laughter)

Seney: Okay. Well, good, that's why I know you'll come back. Thanks.

END SIDE 2, TAPE 2. SESSION II. SEPTEMBER 27, 1995.
BEGIN SIDE 1, TAPE 1. SESSION III. OCTOBER 10, 1995.

Seney: Today is October 10, 1995. My name is Donald Seney. I'm with Robert Pelcyger in the Airport Plaza Hotel in Reno, Nevada, and this is our third session and our first tape. Good evening, Bob.

Pelcyger: Hi.

Seney: Why don't we start by talking about—and again, I'm going to let you take the lead here. I'm not sure I'm earning my money on this, because they're not hearing *my* voice very much. But I want to talk to you about several things: one the lawsuit that the tribe has filed having to do with abandonment and forfeiture; we need to

talk about the Settlement II negotiations; and then this business of unappropriated water, which you're here to see about tomorrow, part of that, I guess. So any way you'd like to start, and any place that makes sense.

The Issue of Forfeiture and Abandonment

Pelcyger: Okay. Well, let's talk about the forfeiture and abandonment water. I guess that's maybe first in time. Like most things, it has a history, and one thing led to another, and it got to be much more than I think than anybody—much more than I had anticipated. The issue grew out of OCAP litigation.

“One of the things that we discovered in dealing with the OCAP issues was that there was a considerable amount of land at the Newlands Project that was being irrigated but didn't have water rights. . . .”

One of the things that we discovered in dealing with the OCAP issues was that there was a considerable amount of land at the Newlands Project that was being irrigated but didn't have water rights.

“. . . one of the things Judge Gesell did in his OCAP which the Secretary adopted was prohibit any deliveries to land that didn't have water rights. . . .”

In fact, in the 1973 OCAP, which were the result of the proceedings before Judge Gesell, one of the things Judge Gesell did in his OCAP which the Secretary adopted was prohibit any deliveries to land that didn't have water rights.

“The OCAP went further than that and said that anybody who violated the OCAP, by, for example, irrigating non-water-righted land, would have *all* of his deliveries shut off. . . .”

The OCAP went further than that and said that anybody who violated the OCAP, by, for example, irrigating non-water-righted land, would have *all* of his deliveries shut off. So this was a problem that we knew about, and indeed this was one of the issues which Judge Gesell found where the Secretary had violated his trust responsibility to the tribe by not prohibiting these illegal deliveries.

Seney: How did you discover that this was going on?

Pelcyger: Um

Seney: Let me maybe help refresh your memory. I know one part of it is that say when an eighty-acre parcel was originally purchased with the water rights, there would be a lot of sand. They would drag the sand into the middle and maybe it would take up as much as three or four acres. And not wanting to buy water rights for something they thought they'd never irrigate, they just bought seventy-six acres' worth of water rights. Over the years, that's been smoothed out, so they're really irrigating eighty acres. I know that's *part* of what was discovered, wasn't it?

How Water Came to Be Applied to Non-Water Righted Land on the Newlands Project

Pelcyger: Yeah.

“ . . . it was a question of what lands were determined to be irrigable at the time when the water rights were issued . . . ”

I don't think it was a question of what they bought, it was a question of what lands were determined to be irrigable at the time when the water rights were issued, and they had soils maps and soils classifications. And it wasn't so much, I don't think, that they dumped sand at certain places, but that the natural features of the land—there might *be* a sand dune or something in the middle, or a field, or an end of a field, or there could be marginal lands, or there could be high spots.

“Apparently a lot of the land got to be irrigated as a result of laser leveling technology, when that came into play. . . .”

Apparently a lot of the land got to be irrigated as a result of laser leveling technology, when that came into play. But I don't remember specifically now how we discovered this issue. I think it was known to the Bureau of Reclamation, and during the course of preparation for the litigation when we deposed witnesses or deposed officials of the Bureau of Reclamation and discovered their documents, we found reference to this ~~fact~~ [situation].

Water Rights Transfers on the Newlands Project Were Originally Handled by Reclamation Rather than the State Engineer, and under the Terms of Judge Gesell's OCAP Reclamation Stopped Approving Transfers When TCID Violated the OCAP and Ultimately Terminated the O&M Contract When TCID Continued to Violate the OCAP

And also, the irrigation of non-water-righted land figured in another way in the OCAP process because we recognized, and Judge Gesell recognized, that something would have to be done to solve that problem. This subsequently changed, but at the time, the transfers of water rights were being handled by the Bureau of Reclamation, not by the Nevada state engineer, which subsequently happened. And I mentioned during our previous conversation that we were concerned that the OCAP wouldn't be enforced, because they hadn't been enforced before, and indeed they hadn't been complied with by T-C-I-D. So one of the sanctions that was also put into the OCAP at the tribe's suggestion by Judge Gesell was that if T-C-I-D or any individual water user violated any provision of the OCAP, at that point the Secretary could not approve any transfers of water rights. And that's actually what happened in 1973, the spring and summer of 1973, as T-C-I-D was violating the OCAP. The first sanction that was imposed was that the Bureau of Reclamation stopped the process of approving transfers. Maybe this is how we found out too: there had been applications on file with the Bureau of Reclamation, which were being processed. I want to say something like 500 acres, or something like that, where there were transfers prior to the Bureau of

Reclamation's decision in, I'd say, July of 1973, not to approve any more transfers, because T-C-I-D was violating the OCAP.

“ . . . when T-C-I-D continued to violate the OCAP and to ignore the repeated warnings, then the Bureau of Reclamation terminated the contract . . . ”

So that was the first sanction, and then afterwards, when T-C-I-D continued to violate the OCAP and to ignore the repeated warnings, then the Bureau of Reclamation terminated the contract and we talked about what happened after that.

In the Alpine Decree Judge Thompson Specified That Appeals of State Engineer Decisions Would Go Directly to Federal Court

So anyway, nothing more was done about that illegal use of water issue until the 1980s. In 1980, Judge Thompson here in Nevada issued a final decree in the *Alpine* case, that adjudicates the Carson River. The tribe was not a party in that case, but the government was a party. And one of the issues that Judge Thompson dealt with in the case—not just for the Newlands Project, but for the entire Carson River—was how water right transfers would be done under the Alpine Decree. So he included a provision in his decree under which, at least in Nevada, applicants for transfers were required to file applications with the state engineer. And then he provided that appeals from the state engineer's decision would come to the Federal Court—which is a strange procedure for a state administrative decision to be subject to appeal in a Federal Court.

Seney: Without first going through the state courts?

Pelcyger: Without first going through the state courts. And that decision was issued in 1980, and it was appealed by the government, the tribe filed an *amicus curiae* brief. We didn't much like the provision dealing with transfers, especially as applied to the Newlands Project, because we felt that that was a Federal Project and it should be handled through Federal procedures, as it had been prior to that. But the Ninth Circuit affirmed that portion [knock at door, tape turned off and on] So we were talking about the Alpine Decree (Seney: Right.) and most of it was affirmed by the Ninth Circuit in 1984. The Supreme Court didn't review the decision.

After the Alpine Decree Many Water Rights Transfer Applications Were Filed to Correct the Issues on the Newlands Project

And so after that, there were a flood of applications filed by farmers on the Newlands Project—I might say several hundred over a period of time. And these applications were all—or most of them—were filed to correct this problem.

Seney: These would have been filed in front of the State engineers now?

“ . . . there was a lot of pressure to file . . . the validity of the OCAP had been upheld . . . Interior Department was beginning to clamp down . . . they didn't include these several thousand . . . acres of land that had been irrigated but didn't

have water rights . . . maybe 20,000-, 25,000 acre feet of water within the project, which is substantial. . . .”

Pelcyger: Right. And there was a lot of pressure to file them, because at this point now, the validity of the OCAP had been upheld, and the Interior Department was beginning to clamp down on the project, and so when they determined the amount of water to which the project was entitled, they didn’t include these several thousand—we think maybe 5,000 or so—acres of land that had been irrigated but didn’t have water rights—which probably accounted for maybe 20,000-25,000 acre feet of water within the project, which is substantial. So these applications began to be filed, and of course the transfer application is the proper way to address this issue.

“ . . . they initiated a search . . . to locate paper water rights within the Newlands Project. . . . water rights which exist on paper, but which had never been irrigated, or . . . not . . . irrigated for a long time. . . . typically . . . on land that had roads on them or canals or drains or parking lots or corrals or houses, so that . . . were also devoted to uses that were inconsistent with irrigated agriculture. And not all, but the vast majority of water rights applications fell into this category. . . .”

But the farmers on the Newlands Project, I think under the leadership of T-C-I-D, went about it in a unique way. Ordinarily what you would think about doing, if you were trying to address the problem, is if you had the situation you described where you had seventy-six acres of water rights and you had an eighty-acre field that you wanted to irrigate, and the four acres that you were irrigating that didn’t have water rights were in the middle of the field, you would build a little berm around the side of the field to exclude four acres on the side of the field, and seek then to transfer the water rights for those four acres which you had been irrigating, over to the four acres which you had *also* been irrigating, but didn’t have water rights for. And then you would retire and not irrigate the four acres on the side of the field. And if they had done it that way, it wouldn’t have been a problem. But they didn’t. Instead they initiated a search—which I imagine was probably very expensive—to locate paper water rights within the Newlands Project. I say “paper water rights,” meaning water rights which exist on paper, but which had never been irrigated, or at least had not been irrigated for a long time. And typically, these water rights were on land that had roads on them or canals or drains or parking lots or corrals or houses, so that not only were they not irrigated, they were also devoted to uses that were inconsistent with irrigated agriculture. And not all, but the vast majority of water rights applications fell into this category. So what you’d find in your four-acre example is that that water right owner would go around, not necessarily even on his own land, but he would try to find water rights scattered throughout the project. If he had four acres, he might find an acre here, half-an-acre here on a road, and another three-quarters of an acre on a canal over here, and he’d put it all together, wrap it up, and file a transfer application to transfer that water rights from what we then termed “inactive” water rights, to try to correct this problem of how to get water rights onto the land that was being irrigated illegally. Well, we protested those, the tribe did, and it took us some time—this is pretty unorthodox; we knew something was wrong.

Seney: You say something was unorthodox. Not what *you* were doing, but what they had done?

“It was contrary to the interests of the Pyramid Lake Paiute Tribe, because if they succeeded . . . they would be *increasing* the water rights entitlement of the Newlands Project. . . .”

Pelcyger: Yeah, but this is an unorthodox procedure. It was contrary to the interests of the Pyramid Lake Paiute Tribe, because if they succeeded, what they would be doing is, by activating these inactive water rights, they would be *increasing* the water rights entitlement of the Newlands Project. And that would mean that there would be more Truckee River water that would be diverted away from Pyramid Lake. And so we protested those applications. And we went through hearings before the state engineer. And we went through, over the course of, I don’t know, the next seven years, from ‘84 through ‘91, maybe ‘92, we went through several different rounds of hearings where the state engineer would group together forty or fifty of these applications, and he’d have a hearing and he would issue rulings. And the state engineer approved all of the transfers. We appealed his decisions to Judge Thompson, who also approved them. We appealed to the Ninth Circuit; the *Transfer* case has gone now to the Ninth Circuit twice, the first one in 1989 and the second one in 1993.

“. . . of the various grounds that we asserted in opposition to the transfer, the one that succeeded was the claim that these inactive water rights had been abandoned or forfeited, or that they never existed in the first place, because they’d never been perfected. Perfection is a requirement of Nevada law. . . .”

And of the various grounds that we asserted in opposition to the transfer, the one that succeeded was the claim that these inactive water rights had been abandoned or forfeited, or that they never existed in the first place, because they’d never been perfected. Perfection is a requirement of Nevada law.

Seney: “Perfection” meaning?

Pelcyger: Putting water to beneficial use.

Seney: So they were never actually used to begin with.

Pelcyger: Right, in some instances. And the Ninth Circuit didn’t conclude that any particular water rights were or were not abandoned or forfeited. There’s a technical difference between abandonment and forfeiture. Under forfeiture, a water right is deemed forfeited in Nevada if it’s not used for five consecutive years. Abandonment, on the other hand, requires an intent to abandon, which is harder to prove, because it requires a finding regarding the intent of the owner of the water right. And for complicated reasons, water rights in Nevada *only*—Nevada is unique in this regard—water rights in Nevada that were initiated or vested prior to 1913 are not subject to forfeiture, they’re only subject to abandonment. So the Ninth Circuit essentially ruled in these cases that the state engineer was required to look at each

of these individual transfers and make a determination of whether or not the water right had been abandoned or forfeited or never had been used in the first place.

Seney: Something that he hadn't done in these original hearings.

The Logic of the State Engineer in Approving Water Rights Transfers

Pelcyger: Right. The state engineer kind of looked at the whole project as a whole and said, "Well, there was irrigation going on, so water was put to beneficial use." It didn't so much matter *where* it was—in fact, it didn't matter at all.

Seney: Did it surprise you that the state engineer looked at it in this way, or did you kind of consider this as a local court—not technically speaking a court, but a local hearing—and we're not probably going to win here.

“ . . . generally speaking, throughout the West, the state water officials tend to be sympathetic with the water users as sort of *their* constituency. And Indians and environmental interests are not favored. . . . ”

Pelcyger: It didn't surprise me. As I indicated before, the tribe had feared this result previously when we appealed the decision which gave the state engineer this authority. I don't want to make any accusations of anybody in particular—but generally speaking, throughout the West, the state water officials tend to be sympathetic with the water users as sort of *their* constituency. And Indians and environmental interests are not favored. Federal interests, reserved water rights, those kinds of things generally are not favored. Here there was a history also of litigation and adversity of interests between the tribe and the State for a long time. So it wasn't surprising. But in any event, another thing that the Ninth Circuit decided was that the state engineer and the Newlands Project water users had argued that forfeiture didn't apply to Newlands Project water rights because those water rights were all initiated by the United States in 1902, prior to 1913.

The Ninth Circuit Also Ruled That it Was the Time of Acquisition of the Water Right That Counted So Dealing with the Individual Transfers Will Be Quite Complex since Water Rights Issued Before 1913 Are Not Subject to Forfeiture, but They Are Subject to Abandonment

But the Ninth Circuit said that didn't matter, that the critical date here was not when the United States initiated the water rights for the project as a whole, but rather when the individual landowner within the project acquired those water rights or initiated use of those water rights on his or her own land within the project. And while many of those uses and water rights were issued prior to 1913, there's a substantial number that were issued *after* 1913.

So, anyway, it was in, I think 1993 when the Ninth Circuit's second decision came out, in which the—as I indicated—the Ninth Circuit indicated that we'd have to go back and redo all of these transfer applications. We may be about to begin on that process pretty soon. And it is difficult, because you have to look at each of

these parcels. And as I indicated, even a simple transfer application for five acres might have five or ten separate strips of land that are involved in it, which they're seeking to transfer water rights from, because they've made this humongous effort to try to identify these inactive water rights, which is what led to the forfeiture and abandonment issue.

Seney: So you'd have to go look at each one of those little strips and chunks to see if it was prior to 1913, or after 1913?

Pelcyger: Right. And there are aerial photos that go back on the project to at least, I think, as early as 1947. So you have to locate each one of these parcels or strips on these. And they were periodic—maybe 1947, maybe 1958, several in the '60s. And you look for a history. You also look for the pedigree of the water right to find out when it was issued.

“... we began to realize ... the total amount of water rights within the project that were issued were something like 73,000 acres of water rights ... but the total amount of land which had been irrigated was about 60,000 acres, so it was about a 14,000-acre difference between the water rights that were out there someplace and the amount of land that had been irrigated. ...”

But that [is a long] process then, the Ninth Circuit's decision was issued in January of 1993, I believe. And then [we] began to realize that we really had a tiger by the tail here, because the total amount of water rights within the project that were issued were something like 73,000 acres of water rights--73,000, 74,000 acres—but the total amount of land which had been irrigated was about 60,000 acres, so it was about a 14,000-acre difference between the water rights that were out there someplace and the amount of land that had been irrigated. Now, we could account for about 4,000 or 5,000 acres of those that were involved in the transfer proceedings, but what about the other 10,000?

“... we got concerned ... because the Nevada Supreme Court had ruled ... that even though a water right had not been used for five years, and was therefore subject to forfeiture under the Nevada statute, if the water user put the water to use, say, in year seven or year eight, without any legal challenge having been filed, that the water right could be revived ...”

And now that the Ninth Circuit had said that these water rights are subject to laws for forfeiture and abandonment, we got concerned particularly also because the Nevada Supreme Court had ruled around that time in another case not involving the Newlands Project, but in another case involving a claim of abandonment or forfeiture—I guess it was a forfeiture claim—that even though a water right had not been used for five years, and was therefore subject to forfeiture under the Nevada statute, if the water user put the water to use, say, in year seven or year eight, without any legal challenge having been filed, that the water right could be revived, essentially, and that the forfeiture would be overcome by use after the statutory five-year period. And so naturally we were concerned that—especially with all the publicity that this was getting in the Fallon area—that that's exactly what would

happen, and that there would be a frantic rush to resuscitate all of these long-inactive water rights involving 10,000 acres, which is a very substantial amount.

Filed a Forfeiture and Abandonment Petition for 7,000 Acres of Land, about 35,000 Acre Feet of Water Rights, Based on Computer Generated Mapping of All Water Righted Acreage Compared with All Lands Irrigated at Any Time Between 1984 and 1990

So that's what led to the filing of the forfeiture and abandonment petition. Through computer mapping, we were able to, we think—how successful we were will be determined—but we had mapped in the computer all the water-righted acreage, and we had mapped all of the irrigated acreage, and so one of the things the Bureau of Reclamation did was to come up with what we called a “composite map,” which identifies every acre of land within the project that was irrigated at any time between 1984 and 1990, based on aerial photography.

“ . . . by process of elimination, if we had all the water-righted acreage, and we had all of the irrigated water-righted acreage, then we could identify the water-righted *non*-irrigated acreage—at least . . . during that six year period. . . .”

So by process of elimination, if we had all the water-righted acreage, and we had all of the irrigated water-righted acreage, then we could identify the water-righted *non*-irrigated acreage—at least that had not been irrigated during that six year period. (Pause) We, of course, identified it by individual ownerships, and I don't know if we totalled them all up. But somewhere, I'd say, somewhere in excess of 7,000 acres, which, of course, is 35,000 or so acre feet of water rights.

Seney: Which is a lot of water on that project.

Pelcyger: Which is a lot. So the point I keep making to my friends at the Newlands Project or people who ask me about it who were very upset about it is that—and that's why I've gone into some length here about the history—is that this didn't happen as a result of an offensive action on the part of the tribe saying, “We're going to go out and get those guys,” or “we're going to do this,” or “we're going to do that.” It was a completely *defensive* reaction.

“What initiated this . . . was the efforts of T-C-I-D and the farmers to go out and identify and locate all of this inactive water right acreage, and to deliberately attempt to . . . get something for nothing, and in the process substantially increase their diversions from the Truckee River. And it was the tribe's effort to oppose that, that then started this whole process. . . .”

What initiated this whole thing was the efforts of T-C-I-D and the farmers to go out and identify and locate all of this inactive water right acreage, and to deliberately attempt to, rather than berming off the side of the irrigated parcel and doing it the right way on a one-for-one basis, they tried to get something for nothing, and in the process substantially increase their diversions from the Truckee River. And it was the tribe's effort to oppose that, that then started this whole process.

“Once the process starts, nobody really has control over it . . . One thing led to another, and then pretty soon we were suing 2,000 people, or 1,800 people on the Newlands Project . . . *Not* because the tribe wants to pay me to do this, because they don’t want to. But because we were threatened. . . .”

Once the process starts, nobody really has control over it, or we lose control over it. One thing led to another, and then pretty soon we were suing 2,000 people, or 1,800 people on the Newlands Project—not because we wanted to harass them, not because we wanted to force people who had small parcels of land, elderly people who were living on a fixed income, to go out and hire a lawyer. Not for *any* of those reasons. *Not* because the tribe wants to pay me to do this, because they don’t want to. But because we were threatened. And because especially we felt that once the forfeiture and abandonment issue was prominently publicized locally, that there would be attempts to revive these water rights.

Seney: This really raised the hackles of the people out on the project (Pelcyger: Yes.) who were *very* upset about this.

Trying to Figure out How to Efficiently Proceed Without Having to Deal with Some 2,000 Individual Cases

Pelcyger: Yes. And I understand that. And this was one of the first times, or perhaps *the* first time when we actually sued the individual landowners as opposed to dealing with T-C-I-D or groups of water users, which was more impersonal. You know, we tried in the litigation—the litigation really hasn’t gone anywhere because we’ve been enmeshed in procedural issues of trying [to find] out how to serve these people—whether you can serve them by mail, what happens if you try to serve them by mail and they don’t respond, can you do a class action? And we may even get into issues like if we serve them by mail and they don’t respond and we have to personally serve them, are they going to be required to pay for the cost of service, which is what the Federal rule states. And we have really tried to litigate this in a way that would be efficient, where we could use some test cases where the larger farmers in the project, or the organizations like the Newlands Protective Association, would represent the interests—everybody’s got a common interest on the project, at least they have so far—where we could try to litigate this in a way that would be streamlined and efficient, where we get some test cases, find out what the law is, and then try to apply it without having to litigate 2,000 individual cases, and where the costs would be borne by, say, Churchill County or the City of Fallon or T-C-I-D--the broad-based groups—the Newlands Protective Association.

END SIDE 1, TAPE 1. SESSION III. OCTOBER 10, 1995.
BEGIN SIDE 2, TAPE 1. SESSION III. OCTOBER 10, 1995.

Seney: The tape went off when you were saying that you’d hoped to maybe get some of the larger defendants, maybe the Newlands Water Protective Association or Churchill County to oppose you in test cases, but they have not been willing to do this?

The Issues Are Before Judge Lloyd George Because They Are Being Forced to

Sue Each Individual, Likely Because it Makes it More Difficult and Costly for the Tribe

Pelcyger: Well, no, and they have said “You’ve got to go out and sue everybody.” Because I suppose they want to make it more difficult for us, and more costly. And we’ve been resisting that. Among other things, we say that, “Look, the statute provides that if we try to serve people by mail and they don’t respond, then they can be hauled into court and required to pay the cost of service.” Which, of course, if there was one or two or even ten people, you would never do. But where there’s 2,000, the costs are going to be potentially large. And then we also said, “Look, we don’t want to inflame the community anymore, we don’t want to cause unnecessary expense.” But the people who were the ones who were complaining most loudly about what we’re doing are also the ones who are trying to make us do things that will further inflame the community. So that issue, right now is before Judge Lloyd George. As I say, we’ve been enmeshed in these procedural issues.

Seney: I know one question the people on the project raise is, “Well, why didn’t you sue everyone up in the Truckee Meadows?” Their view is that, well, you’ve worked out a deal with Sierra Pacific Power over Stampede Reservoir, they’re kind of your friends now, and that involved Westpac Utilities, the water purveyor for Sierra Pacific Power—and *that’s* why you’re not doing it. But I understand you have another legally-based explanation for why the Truckee Meadows people have not been sued.

Why the Tribe Is Not Also Suing over Water Rights Transfers in the Truckee Meadows?

Pelcyger: I want to say that, first of all, there *are* limits. And as you know, the tribe has been very aggressive and pursued a broad-based strategy. But the tribe’s resources are limited, and we have to make decisions like everybody else about how to get the biggest bang for your bucks. One major difference between the Newlands Project and the Truckee Meadows is that every acre foot—I shouldn’t say “every”—but virtually all of the water that’s diverted to the Newlands Project from the Truckee River never returns, and when it returns it’s polluted, which is another whole issue. Whereas in the Truckee Meadows, there’s a significant return flow. And so there’s no question but that every acre-foot of water diverted at the Newlands Project is at least twice as harmful to Pyramid Lake as water diverted to the Truckee Meadows. So there’s a physical difference, because the water [of the] Newlands Project goes to a different watershed and never returns. So there’s that aspect.

Differences Between Water Rights in the Truckee Meadows and Water Rights on the Newlands Project

Another significant difference is that—let’s say the two other major differences—all of the water rights in the Truckee Meadows area, virtually all of them, are decreed, separate water rights that are decreed. That didn’t happen at the Newlands Project. For the Newlands Project the decrees just give a water right for the project as a whole, not the individual acreage. And so the court decree is itself

conclusive evidence that the water right was put to use at one time—otherwise there wouldn't have been a decreed right for it. So you don't have the issue you have at Newlands where water was never put to beneficial use at all [and rights for individual parcels are not decreed].

Seney: So all these are perfected water rights.

Pelcyger: All these are perfected water rights. And the third factor is that virtually all of those water rights were perfected and have priorities earlier than 1913 and wouldn't be subject to abandonment. In addition to that, you've got even more difficult research issues trying to locate these rights. I should say a *fourth* factor is that nobody in the Truckee Meadows area has gone out to try to locate these rights and put them back to use. And again, the tribe doesn't stay up late at night trying to think of "What kinds of new lawsuits can we bring?" The tribe responds to situations. And this whole thing began as a response to what the Newlands people did. Nobody has done that in the Truckee Meadows. But it would be even more difficult, because a lot of these rights probably got lost when land was subdivided *before* there got to be an active water rights market in the Truckee Meadows, and maybe under streets, and the ownerships may be fractionated. It's much more difficult to trace them than it was at the Newlands Project—or to map them.

Seney: Is there any truth, do you think, to the feeling that some of the people on the project have—and I don't know that I want to put it in their terms—but the fact that the tribe *has* established a good rapport with Sierra Pacific Power? (Pelcyger: Sure.) And I mean, you're not likely to go out and bite the hand you've shaken. That's got to factor into your thinking too.

The Relationship Between the Pyramid Lake Paiute Tribe and Sierra Pacific Power

Pelcyger: Well, sure it does. Well, and it's not just that—it's that we have entered into agreements, they are mutually beneficial agreements, they're agreements which benefit *greatly* the Pyramid Lake Paiute Tribe. And part of those agreements have to do with excess Sierra Pacific water rights, after they're originally stored for a drought, if their storage accumulates beyond certain levels, then those water rights convert to being fish water rights. And so the tribe, in effect, becomes a beneficiary of Sierra Pacific's excess water rights. And so it's not in our interest to challenge those. It's not just a question of "we don't want to do anything to damage the relationship between the tribe and Sierra Pacific"—it's that we have worked out an agreement, and we'd be perfectly willing, if we could, to try to do something like that [with T-C-I-D]. In fact, we'll be talking about that soon. We've tried very hard to deal with the Newlands interests in the same way. And if we could come up with a solution that would lessen the adverse impacts of these inactive water rights, or come up with some kind of a mechanism, as we've done with the Truckee Meadows interests to come up with a win-win situation, then we would be willing to reconsider the claims against the Newlands Project. So sure, that's a factor.

Seney: Are you suggesting that if you were, say, to undertake an abandonment, and I guess

it would have to be abandonment (Pelcyger: Right.) rather than forfeiture claims on the Truckee Meadows and were you to *win*, you'd essentially be taking water rights out of one pocket and putting them in the other because you've already got them through the agreements you've negotiated?

The Difference in Outlook Between the Truckee Meadows Interests and the Newlands Project

Pelcyger: There's some of that; there's a possibility of that. Another thing that's happening, there's just a very different mentality in the Truckee Meadows than there is in the Newlands Project.

Water Quality Is an Issue for Both the Tribe and the Truckee Meadows Area

One of the things, in fact, that's happening now is that some people who were interested in—and we've just been through a major drought here in the Truckee Meadows, and the Truckee River is very, very important not just to the tribe, but to people who live in the Truckee Meadows, I think, who see it as not only as something that's important in and of itself, but it's something that is sort of like the miner's canary—it symbolizes the environmental health and well-being of the community. And during the drought to see the river dry during substantial periods of time, and with nothing but isolated pools of water with algae growing in it and not much wildlife, or very little—essentially a river no more—people began to think “what can we do about that?” And we're negotiating a water quality agreement with the cities of Reno and Sparks and Washoe County.

Seney: That's pretty far along now, isn't it?

A Water Bank Is in the Works to Identify Inactive Truckee Meadows Water Rights to Be Water Banked and Ultimately Used to Improve Water Quality in the Truckee River and That Water Would Eventually End up in Pyramid Lake

Pelcyger: Yes. Another thing that's happened, and this has been really more community-based than government-based, is that some people got together and are trying to create, and have gotten some money for this from EPA [Environmental Protection Agency], but they're trying to create a water bank which would—their concept is to try to locate these fractured or inactive water rights in the Truckee Meadows, do research to identify who owns them, and then to urge the owners to donate in return for a tax write-off, these water rights to the water bank, and to dedicate them for instream flows. Which of course would be instream flows from Reno-Sparks to Pyramid Lake, so the tribe would benefit from that. And we could try to get the Federal government to provide storage for those, so that they would be available, especially during drought years, to augment *other* ways of improving water quality and enhancing instream flows. So there's a very different kind of a mentality here, and that's a very creative proposal, something we didn't have anything to do with, but obviously these people came to us and said, “Would you support it and help us get grant funds?” and we said, “We'd love to.” And they said, “We do *not* want these water rights to go for growth, we do not want them to be municipal, we want

to find these people, and we think there's a much better chance of having them donate their rights if they are used for the health and quality of the community." So I think that's a really innovative program, and if we can get what we want that way, it's obviously a whole lot better than suing people.

Seney: Right, exactly. Has there been any movement at all with T-C-I-D? Is there any talk amongst the tribe and T-C-I-D about recoupment, for example?

Pelcyger: No.

Seney: I mean, if they had been, from your point of view, forthcoming on the recoupment issue, that might have made a difference in terms of what you're pursuing here. (Pelcyger: Sure.) I mean, you characterize and describe two very different situations. It must be frustrating, challenging, T-C-I-D. The other one kind of gratifying and interesting.

Reno-Sparks, Washoe County, and Sierra Pacific Power Have Begun to Plan Together for Water Issues in the Area

Pelcyger: Yes. It's been, I think, also very significant that not only for Pyramid Lake and the Truckee River and the Truckee Meadows community that we've been able to find these areas of convergence with quality of life issues, drought water supply issues, and enhancement of endangered fisheries—even aside from all of the context, it's been very exciting, because it demonstrates that these kinds of situations exist where—especially environmental interests not only can coexist with urban interests, but that they can support and reinforce each other. And so it's not win-lose, it's not the endangered *cui-ui* against Reno and Sparks: it's by pulling together and by trying to be creative and find win-win situations, having mutual respect, and a lot of hard effort and good will we can come up with, these interests can be made compatible, and we don't have to be fighting. I think that was a real major revelation and a real change in mind-set. You know, we can think of ways where we might come up and say, "Hey, how about this, Sierra Pacific?" or "How about this Reno and Sparks?" I don't know whether I mentioned to you the last time we talked, but this is a quite remarkable development to me, especially considering a history of adversarial relationships. The tribe became actively involved in the regional water planning process that was going on in Reno-Sparks and Washoe County from 1990 through 1994. And some of that involved the Honey Lake Project which the tribe actively opposed that, and Washoe County was actively promoting it. It was a lot of friction. But during the course of that effort, there was a technical advisory committee that was formed, and the tribe had a representative on that technical advisory committee, it came about as a result of an arbitrator issuing a decision, saying, "You'd better involve the tribe." But after that effort, and after the Honey Lake Project was killed, Reno-Sparks and Washoe County and Sierra Pacific Power Company, without the tribe, got together and said, "Look, we've got to address the water situation, because we're always in conflict, we're going in different directions, we've got this private utility on the one hand, we have these governmental entities on the other," and the governmental entities, Reno and Sparks, were very opposed to what Washoe County was doing, "so we've got to try

to get a better handle [on this].” They proposed to create a water planning commission, with representatives from these four entities. And at their own initiative, without any prodding or anything else from the tribe, they actually invited the tribe to have a permanent voting member of this water planning commission.

Seney: And the tribe accepted?

Pelcyger: And the tribe accepted. The tribe said, “We’d be glad to do that, and we appreciate the offer. The only thing we’re concerned about is that we don’t want to sacrifice our sovereignty. We don’t want our participation in this commission to limit our options or to sacrifice our rights or subordinate our rights.” And they were very willing to accept that. They said, “No, we just wanted you to be involved in the planning process so we can hear your views.” So I don’t know whether there’s any other situation—if there is, I don’t know about it, where that kind of thing has taken place. But I think it indicates how much the mind-set has changed, and that people really do believe that these interests can coexist.

The Tribe Opposed the Honey Lake Project

Seney: Why was the tribe opposed to the Honey Lake Project?

Pelcyger: Oh gosh! You want to get into that?! (laughter)

Seney: Very briefly. I mean, it was a very controversial project, I know.

Pelcyger: It was a *bad* project. It was a project that was designed to make a lot of money for promoters. It was unnecessary, it would have taken a lot of money. For example, I don’t think we would be having a water quality agreement with Reno and Sparks and Washoe County putting in \$12 million to purchase water rights if they had committed themselves to \$150 million water importation project. It had adverse water quality implications for Pyramid Lake and the Truckee River. It was just a bad deal that was unnecessary. They wouldn’t have been able to probably put in the money to put in water meters in Reno-Sparks, which is an important water conservation measure. It was a question of priorities; it was a question of water quality. You can go out in South Truckee Meadows and look at this \$20 million dam that they put in—must be five or six years ago. [phone rings, tape turned off and on] This was part of a South Truckee Meadows sewage treatment facility that Washoe County had planned to take care of the growth in the area. And they needed a place to store the treated effluent, because it was going to use a land application process, and they could only use those during the irrigation season, so they needed to be able to store the effluent. It was a very badly thought-out plan. But the short of it is that they spent I think around twenty or more million dollars in anticipation of the cost being paid back by new growth of the subdivisions that would hook into that plant. But there haven’t been any [subdivisions]. You can go out there and see this dam sitting out there. So the general taxpayers, because they were the guarantee for the bonds, are paying off the costs of this dam that never should have been built. That would have been the same thing for this Honey Lake

Project. And it would have stimulated growth because they would have had a very large obligation—the only way they could pay it off [other than by using general revenues] was with growth.

Seney: And yet the water there was not really assured. (Pelcyger: Right.) I mean, you couldn't guarantee it year after year.

Pelcyger: Well, it was a bad project. There were concerns about contamination, because they were pulling off the ground water basin that also underlay the Sierra Army Depot, which is a Superfund cleanup site and has all kinds of toxics buried in the soil, and indications that it is draining toward the area where the wells were going to be. So it was just a bad project.

Seney: Did we cover the part, you're going tomorrow to see about the hearing (Pelcyger: Unappropriated water.) unappropriated water. (Pelcyger: No.) Do you want to talk about that?

Unappropriated Water on the Truckee River

Pelcyger: Yeah. That, I think, can be done pretty briefly.

“The water that Pyramid Lake is receiving today, for the most part is flowing into Pyramid Lake not because Pyramid Lake has a right to it, or because the tribe has a right to it, but because it exceeds everybody else's demands at various times. Most of it comes during the high spring runoff. . . .”

The water that Pyramid Lake is receiving today, for the most part is flowing into Pyramid Lake not because Pyramid Lake has a right to it, or because the tribe has a right to it, but because it exceeds everybody else's demands at various times. Most of it comes during the high spring runoff. It's essential to the lake, but there's no right to it. And theoretically at least, it could be appropriated by other people. There could be a new dam built on the Upper Truckee. And so the tribe's goal is to augment the flows in the Lower Truckee River and to Pyramid Lake in order to restore the health and well-being of the Pyramid Lake-Truckee River ecosystem. But before you can even think about augmenting the flows, you've got to be able to protect what you're now getting, which is substantial. It varies a lot, in dry years it's very little, but in wet years it's very large. So maybe it averages 400,000 acre feet of water a year or something in that neighborhood. Maybe that's not quite right, because Pyramid Lake also receives water from Stampede, which is earmarked for that purpose.

“ . . . one of the conditions that the tribe set for the settlement was that before the Settlement [Act] could take effect, the tribe's claim or right to this unappropriated water would have to be resolved. And there was a provision in P-L 101-618 that . . . the tribe's claim to the remaining waters of the Truckee River, which are not subject to prior vested rights, would be resolved in a way that was satisfactory to the tribe and to the State of Nevada. . . .”

In any event, one of the conditions that the tribe set for the settlement was that before the settlement could take effect, the tribe's claim or right to this unappropriated water would have to be resolved. And there was a provision in P-L 101-618 that said that, among other things, the Truckee River Operating Agreement and the interstate allocation wouldn't take effect until the tribe's claim to the remaining waters of the Truckee River, which are not subject to prior vested rights, would be resolved in a way that was satisfactory to the tribe and to the State of Nevada.

And so after the Act passed, the tribe negotiated with the State about how to go about fulfilling that requirement, which the State wanted very much to fulfill. There were basically two paths that were available to us. One that the tribe favored was to have that water right established as a Federal water right, as a reserved water right. And we took the position that the unfavorable Supreme Court decision left that path open to us because it didn't say that there was no reserved water rights, it just said that we were precluded from asserting a reserved right that conflicted with rights that were decreed in the *Orr Ditch* case. There were no other rights to this water, and so we basically said the State should recognize that we have a federal reserved water right for this.

“ . . . the tribe back in 1984 had filed applications with . . . to appropriate under state law this remaining unappropriated water, without conceding that we didn't have a right to it. . . . ”

The State didn't want to do that, and the tribe back in 1984 had filed applications with the Nevada state engineer, more or less as a protective measure. After we lost the *Reserved Rights* case, the tribe had filed applications to appropriate under state law this remaining unappropriated water, without conceding that we didn't have a right to it.

So this unappropriated water issue also got mixed up with another issue that was addressed in the Settlement Act—it was sort of a grab bag—involving the tribe's ownership of the beds and banks of Pyramid Lake and the Lower Truckee River. And we entered into an agreement with the State which resolved both of those issues. And the agreement on the unappropriated water essentially was that the tribe agreed—which was difficult for the tribe to do—to pursue its appropriations filed with the state engineer, rather than its claim under Federal law to the unappropriated water. The State agreed that *if* the state engineer granted the tribe's applications, that they would be incorporated in the *Orr Ditch Decree*, and the *Orr Ditch Decree* would be amended to provide that the Truckee River was now fully appropriated. And other protections would be included so that we would have a hybrid water right. And in the process, the State relinquished its claim for the beds and banks of the Truckee River and of Pyramid Lake, which was a *real*, real sensitive issue for the tribe. We actually had to get a bill through the State Legislature to do that. And so that's what we're doing tomorrow.

Seney: This is part of the process you're going through, (Pelcyger: Right.) since you're making an argument now to the state engineer that this [unappropriated water]

ought to be granted to you?

At First Everyone Protested the Water Rights Application and Filed Competing Applications, but the Tribe Has Reached Agreement with Everyone Except TCID

Pelcyger: Right. And again, we did reach a settlement again here with everybody except T-C-I-D. The tribe's applications, when they were filed in 1984, first of all were protested. At that time we were at war and they were protested by all the usual adversaries at that time: Sierra Pacific, Reno, Sparks, Washoe County, Washoe County Water Conservation District, and of course T-C-I-D. And most of these other entities also had filed competing applications: Sierra Pacific had, Reno and Sparks had, Washoe County had.

Seney: For this surplus unappropriated water?

“ . . . we negotiated successfully with everybody except T-C-I-D . . . Again, it was in their interest because this had to be done for the Settlement to take effect. That was the driving force. . . . ”

Pelcyger: Right. And the tribe had protested their applications. But we negotiated successfully with everybody except T-C-I-D under which they withdrew their protests to our application, and withdrew their competing applications and agreed to support the tribe's application. Again, it was in their interest because this had to be done for the Settlement to take effect. That was the driving force.

Seney: Little goodies in there for them.

Pelcyger: Right. And we also settled it in a way so that Reno and Sparks were able to get applications approved by the state engineer for the sewage effluent from the Reno-Sparks Treatment Plant, subject to conditions that made it acceptable to the tribe.

Seney: Let me put the other tape in.

END SIDE 2, TAPE 1. SESSION III. OCTOBER 10, 1995.
BEGIN SIDE 1, TAPE 2. SESSION III. OCTOBER 10, 1995.

Seney: Today is October 10, 1995. My name is Donald Seney and I'm talking with Robert Pelcyger in the Airport Plaza Hotel in Reno, Nevada. This is our third session and our second tape. Did you need to say any more on that part, do you think, Bob, on those appropriations for water? I guess I'm understanding it right, that is, when you get these big spring flows and everybody's taking water, they can only take so much, and a *lot* flowing by. (Pelcyger: Right.) And what you want to establish is your right to what flows by at that time.

The Effect of the OCAP on Water Flowing into Pyramid Lake

Pelcyger: Right. Well, and it's not only that, it's also that as we tighten up the OCAP, for example, even now as we speak the Truckee River is flowing and water is being

released from reservoirs to meet the Floriston Rates, and it's water that would previously have been diverted at Derby Dam, but because of the OCAP, Lahontan is high. The OCAP didn't make Lahontan high the spring runoff, last year's wet winter, made Lahontan High. But they're not entitled to divert any more water now. So it's not flood time, and there's substantial flow now going to Pyramid Lake.

Seney: And that's part of this unappropriated water that you want a right to.

“ . . . the more we reduce the diversions to the Newlands Project, the more unappropriated water there becomes. We just want to prevent anybody else from being able to divert that water. . . . ”

Pelcyger: Right. So the more we reduce the diversions to the Newlands Project, the more unappropriated water there becomes. We just want to prevent anybody else from being able to divert that water.

Seney: And theoretically, Westpac could divert it, or someone else with rights along the Truckee, before Pyramid Lake.

Pelcyger: Right.

Seney: Will T-C-I-D be at that hearing to oppose you?

TCID in 1930 Filed on 100,000 Acre Feet of Unappropriated Water in Addition to Their Allotment under the Orr Ditch Decreed

Pelcyger: Yes, they will. (chuckles) This is one of those *Ripley's Believe It or Not* scenarios: In the process, the state engineer went back into their records when they convened a hearing on this unappropriated water, and lo and behold what did they find? but they found an application that T-C-I-D had filed in 1930 to appropriate 100,000 acre feet of additional water, over and above whatever they got in the *Orr Ditch Decree*, from the Truckee River, which had never been acted on. So we all thought, “This is crazy.”

Seney: Does that mean that that takes priority over your application?

Pelcyger: It would if it were granted. But it's crazy, because the Newlands Project has water rights for far, far more water than they can use from the Truckee River, and they've been ratcheting-down the diversions, and here is this application to appropriate an **additional** 100,000 acre feet over and above what the United States is already entitled to divert to the Newlands Project. So when we heard about that, we joked about it and thought for sure that T-C-I-D would realize that that was not going to happen, and that it would be foolish to pursue it. But contrary to **my** expectations, they said, “No, we found this application and we're going to be serious about it.” And they hired lawyers and they presented a case. They were told by Senator Reid, I think, and everybody else that this is just silliness and there was no way [it would be granted]. This was a great opportunity for them to demonstrate that they had

learned from their mistakes and that they *were* willing to cooperate. But they were having none of it. They viewed it, I think, as an opportunity to throw a monkey wrench into the Settlement or whatever. And this was happening around the same time as the congressional hearings were taking place.

Seney: I read those April hearings (Pelcyger: Yes.), and December '93 and then the April '94 ones, and I was reading the April '94 and Senator Reid's statement. Him saying that, "Well, here T-C-I-D has just revived some old claim." (Pelcyger: Right.) And this is clearly what he was referring to. I didn't understand what he was referring to—now I *do* understand.

The State Engineer Rejected TCID's 1930 Application on the Grounds the Water Could Not Be Put to Beneficial Use

Pelcyger: Right. And then things got messy because a farmer at the project named Corkhill Brothers Corporation, moved to intervene in the hearing in support of T-C-I-D's application. The state engineer said, "No, you're sixty-four years late." "What do you mean we're sixty-four years late?!" "Well, you should have intervened in 1930." They said, "Well, we didn't know." So the state engineer denied them intervention, and also denied T-C-I-D's application—denied T-C-I-D's application because the Interior Department took the position that even if the application were granted, the Interior Department would not and could not, under the law, allow Federal facilities to be used to divert that water. So the state engineer said, "Well, you can't show that you're going to be able to put this water to beneficial use. Therefore I'm going to deny it." And he did, but the Corkhill Brothers appealed to the State Court judge, saying that they should have been allowed to intervene, and the State Court judge agreed with them. So now this hearing tomorrow is actually a pre-hearing conference, it's not the hearing itself, but it's to deal with this a second time, because now Corkhill Brothers has to be allowed to participate in the proceeding.

Seney: (chuckles) You have a kind of sheepish grin on your face.

TCID in 1994 Tried to Borrow Water from the Pyramid Lake Paiute Tribe out of Stampede Reservoir

Pelcyger: Well, it just goes on and on. And to give you an idea of the practical fallout from this, remember 1994 was a very dry year, and it was especially harsh on the water users in the Truckee Division of the Newlands Project. I won't go into the whole history, but T-C-I-D diverted all the Truckee River water that they could to Lahontan Reservoir early in the year, and so as a result of that, there was a disparity between the water supply available to the water users in the Carson Division as opposed to the ones on the Truckee.

Seney: Right, Carson Division got fifty-seven percent, Truckee Division got twenty-eight percent allocation.

Pelcyger: Right, and the Truckee Division farmers were not happy, and so they put a lot of

pressure on T-C-I-D, and T-C-I-D said, “We’ve got a solution. We’ll go ask the tribe if we can borrow some water from Stampede Reservoir, to use it this year to prolong the irrigation season in the Truckee Division so that they can have at least a fifty-seven percent water year, and we’ll pay it back next year to the tribe when they have a *cui-ui* run. Instead of diverting that water to Lahontan, we’ll let it go down the Truckee River so that we’ll pay it back that way.” And the tribe’s reaction was, “You’ve got to be kidding!” And one of the principal reasons was because they had opposed the tribe’s application and insisted on pursuing their own application, which was obviously not going to be granted, and which was absurd on its face. The tribe said, “We’ll start doing these kind of cooperative programs when there’s some reciprocity.”

Seney: Wasn’t another factor that T-C-I-D had somehow owed the tribe, what, 28,000 acre feet of water?

In Addiiton TCID Owed the Tribe 21,000 Acre Feet of Water

Pelcyger: Twenty-one thousand.

Seney: And they had not paid that back, there’s some controversy.

- Pelcyger: A controversy developed. They *did* pay it back. We had to go to court to get it back. We won again in the Ninth Circuit, and then T-C-I-D agreed to a plan to pay it back. But after it was paid back, T-C-I-D complained that they had been overcharged: not only did they pay the 21,000 acre feet back, but they [said that they] paid an extra 17,000 on top of it for a total of 38,000, and they wanted to force the government to repay them the 17,000, and they lost. It was very ironic that they were asking to borrow *more* water at the same time that they were challenging the previous repayment program. So how could they possibly expect that the tribe was going to agree to loan *more* water, when first of all there’s a million acre feet outstanding out there, that they have resisted repaying for years; and secondly, we had just gotten into another controversy, the very same kind of program.

Seney: There’s a lot of history there, as the saying goes.

Pelcyger: Yeah. But there’s also just a huge gulf in the way that we perceive the world. But at the same time, the tribe has made enormous progress with everybody else—California, Nevada, Reno, Sparks, Washoe County, the wetlands interests, the Federal government—everybody. I think we pride ourselves on the ability to understand where people with different interests are coming from and define these kinds of solutions. With T-C-I-D we’ve just been totally unsuccessful.

WHY THE SETTLEMENT II NEGOTIATIONS WERE HELD

Seney: Let’s talk about the Settlement II negotiations, which really went nowhere. I mean, there were some side agreements that came out of it.

Settlement II Negotiations and Side Agreements

Pelcyger: Important ones.

Seney: Yeah, and maybe you could tell me what those were as we go on. What was your whole take on these negotiations? How did you and the tribe view them? And did you have anything to do with their coming about?

Senators Reid and Bradley Were Interested in Addressing Issues Regarding Newlands and Other Reclamation Projects with Significant Environmental Damage and Injury to Indian Groups

Pelcyger: No. Well, they came about in the first instance because the Newlands Project and the future of the Newlands Project was not directly addressed in 101-618. There were a lot of things in 101-618 that affected the future of the Newlands Project, especially the programs to provide more water both to Pyramid Lake and the wetlands, through acquisition of Newlands Project water rights to restore these very damaged ecosystems at the terminus of the Truckee and Carson Rivers. But the future of the Newlands Project itself was not directly addressed, and there was a lot of debate about what it should be. Senator Reid was interested in this because it affected the implementation of 101-618 which he had a *great* interest in. Senator Bradley was interested in it for that reason, but also because he was the Chairman, at the time, of the Water and Power Subcommittee of the Senate Energy Committee. And he obviously knew that not only was there the Newlands Project out there, but there were other old Reclamation projects that were similar in some respects, probably never would have been built under today's circumstances, which continue to inflict significant environmental damage and were contrary to Indian interests throughout the West. The question is, What's going to happen with these projects? I suppose that's an appropriate question for your group to address. But Senator Bradley was very interested in that, and one way of looking at these projects is that they're dinosaurs, and because they've existed for a hundred years, what's going to happen to them in fifty years, a hundred years? Are they going to exist 1,000 years? So he sort of looked at the Newlands Project as kind of a model, and thought it would be important for Congress to begin to address the question of What about these projects? And how much longer are they going to continue? Or should they be reformed? Can they be reformed? What kinds of problems do you run into? They had done that also after the Pyramid Lake Settlement Act passed with the Central Valley Project. And so there were some parallels there.

Lahontan Valley Environmental Alliance Argued They Were Now Willing to Enter Negotiations Representing a Broader Constituency than Just TCID

So Bradley and Reid got together and held these two hearings, one in Nevada, one in Washington—took testimony. The second hearing was in April of '94. And I think the initial concept was to deal with this through legislation. But they decided, for political reasons in part, that before they could proceed with legislation, that they would really need to try to do everything they could to at least see if it was possible for there to be a settlement. And I think part of this came from T-C-I-D,

and they convinced Senator Reid that they were serious about settlement, and that they had formed this new organization, L-V-E-A [Lahontan Valley Environmental Alliance], and that it was more representative, and a lot of people said that they recognized that they had made mistakes during the previous negotiations, and they would like another opportunity to become involved, and this time it wouldn't just be T-C-I-D on behalf of the farming community, that it would be broader-based, and that they had other interests, broader interests, and that they would participate in a meaningful way in that, and convinced Senator Reid, I think, of that. And also, remember Senator Reid saying when he came to the first session and he said very honestly what was very important to him was that representatives of the Nature Conservancy and the Environmental Defense Fund also urged this kind of a process.

Seney: Were you aware, by the way, that when T-C-I-D discussed this with Senator Reid that they suggested a mediator? And do you know who that was?

Pelcyger: No.

Seney: It was Senator Laxalt.

Senators Reid and Bradley Started the Settlement II Negotiations and Senator Reid Appointed a Mediator

Pelcyger: (chuckles) I didn't know that. The other political factor was that I think it became apparent to Senators Bradley and Reid that it was going to be more difficult to get this legislation through than the previous one. When the hearings were held in Washington, some Republican senators made a point of coming--this was now the Clinton administration--and the Republicans were saying that the Clinton administration was waging the "War on the West," and there was concern that this could be viewed, or would try to be viewed by some as an expansion of the War on the West onto Federal Reclamation projects, and that politically that they needed to show, before any legislation could really get through, they had to show that they had gone the extra mile, done everything that they could to make an honest, good-faith effort to try to come up with some common solutions. So Senator Reid appointed the mediator and we started that process.

The Change in the Congress as a Result of the 1994 Election Changed the Political Climate Considerably

Then of course the Congress changed significantly in November of 1994 and we were faced with a completely different political climate.

Seney: Can I take you a step or two back (Pelcyger: Yeah.) to ask you about the tribe's discussions leading up to the negotiations--especially the discussions leading up to the position that the tribe took in the negotiations. Now, I must say, because of the confidentiality rules, I've had some trouble in getting my hooks on the documentation, but I know a *little* bit about what was said and what went on. I *do* know that the tribe, as it has before, argued for decoupling the two river systems. I

don't know that decoupling was ever in the cards—do you think it was, really?

How the Pyramid Lake Paiute Tribe Viewed the Settlement II Negotiations

Pelcyger: You mean as an outcome of the negotiations, or do I think it's going to ever happen?

Seney: Well, let me put it to you this way

Pelcyger: I don't know if there ought to be headlines out there saying "Tribal Attorney says decoupling is never in the cards." (laughter)

Seney: You've said it so many times, in so many ways, that no one would believe it, even if I got in the press. They would say, "Someone's impersonating Bob Pelcyger!" You've used the [term], I think, "Blow up Derby Dam."

Pelcyger: I never said that.

Seney: Is that right? Well, that's part of the mythology, you know, because numerous people have told me that this is one of the things that you've said, that Derby Dam should be blown up. So this is firmly imbedded, so believe me, any putting about on my part of a story that you don't think it'll be decoupled would not be believed.

Pelcyger: No, no, no. I've said that I thought that diversion should end, and that Derby Dam should be removed.

Seney: Yeah. Well, the mythology—and there *is* a lot of mythology around this—is that certain people have said this, and other people have said that, and I know as I go around and talk to people that they haven't probably said these things. You know there's this kind of mythology. (Pelcyger: Yeah.) My question is this: You guys have done so well through legislation and through litigation, did you really take these negotiations seriously? Did you say, "Well, of course we're going to participate, we've got to participate, but frankly, we're not going to get anything out of this, and we'll put a proposal forth here that says that we want to decouple the rivers." I guess I'm giving you my understanding, as I see these things, and I'd like you to comment on that.

“ . . . the tribe . . . very skeptical that negotiations would produce a successful outcome . . . based on our history of dealing with the Newlands Project. On the other hand, there was this new organization that was formed . . . no question in my mind but that the Fallon community as a whole is being hurt by this conflict, and that there are opportunities that would have been available to them that were shut because of T-C-I-D's position, and it was a question of . . . whether they would in the end bow to the irrigation interests, again. . . . ”

Pelcyger: Well, I think it's fair to say that we, the tribe, were very skeptical that negotiations would produce a successful outcome—not that we didn't want them to, but we just didn't think they would, based on our history of dealing [with the Newlands

Project]. On the other hand, there was this new organization that was formed, and the critical question was going to be whether the community, the interests other than agriculture, were going to be able to assert a strong [position]. There's no question in my mind but that the Fallon community as a whole is being hurt by this conflict, and that there are opportunities that would have been available to them that were shut because of T-C-I-D's position, and it was a question of how strong these other forces were going to be, or whether they would in the end bow to the irrigation interests, again. So I thought that that was worth a shot. I mean, it wasn't a question for me about being worth a shot, because we didn't have a choice.

Seney: Right. Politically, you couldn't really have said, "Oh, we're not going to take part in this."

Approaches That Might Be Taken to Solve the Problems of Truckee River Water Going to the Newlands Project

Pelcyger: Right. And I think generally I believe, and I think the tribe believes, we have had major successes, and so it is better to resolve these things through a mutually beneficial negotiation process than through litigation or other means. (pause) But we did not take a position to frustrate the outcome of the negotiations. What we were concerned about was that—and this put us in a very difficult situation—was that we felt that we had been very successful in reducing diversions at Derby Dam, and we could see that the continuation of the things that were already in progress, the *cui-ui* recovery plan, the recoupment lawsuit, the tightening-up of the OCAP, the *cui-ui* water rights purchase program, and a lot of other things: the water quality program, TROA.

"We had established a great deal of momentum, which I believe ultimately will . . . lead to decoupling the Truckee from the Newlands Project. . . ."

We had established a great deal of momentum, which *I* believe ultimately will lead—I don't know when—but ultimately it will lead to decoupling the Truckee from the Newlands Project.

Urbanization in the Fernley Area Will Affect the Amount of Land Irrigated

Another very important factor in this is the increasing urbanization or *sub*urbanization of the Fernley area, and so much land there going out of irrigation. I think it's a given, no matter what happens, that [a lot of land is] not going to be in irrigation much longer. And you've got the situation where you've got these diversions taking place through the Truckee Canal, and a huge amount of water wasted. And the less water that is used for agriculture and the less that's needed, at some point you're going to get to the point where maybe you'd need 10,000 acre feet of water, say, to be diverted at Derby Dam, but in order to get 10,000 acre feet over there, you'd waste 30,000 along the way, and that doesn't make sense to anybody. So we didn't want to find ourselves in a situation in the negotiations where we wound up *worse* off than we would have been without negotiations—and we felt that that could happen if we agreed to something under which there would

be perpetual diversions, because our feeling is with the momentum that's developed, and with the programs and the lawsuits and the other things that are underway, that eventually those diversions would halt, would be terminated. So we recognized also that that position was not likely to be accepted [at this time].

Believes That What Water Users on the Newlands Project Really Want Is Certainty about the Water Supply

You know, it's interesting to me—I don't know whether they've said this to you—but if you sit down with the Newlands Project leadership and you get past this complaining, and you ask them the question, "What do you really want? If you had your druthers, what do you really want?" And what they say—at least what they've said to me—is "What we really want is certainty. What we really want is stability. We don't want the tribe looking over our backs, criticizing everything we do. We don't want the Federal government doing that. We want to know what we have, and we want to be able to control it and we want to be able to use it in the best interests of the community." And if that's truly what they want, the only way they're going to be able to get that is by getting off the Truckee River. As long as there is a Truckee River link, they're never going to be able to have that kind of control.

Trying to Get TCID to Look at Alternative Ways of Having the Water the Project Needs

And I tried to say that to them. "Look, let's at least sort of start out from zero-based point and see what the project would look like. And then look at other ways and try to figure out what's a minimal amount of Truckee River water that you would need in the worst drought conditions, and then try to figure out some other ways to make up for it. Because it *doesn't* make sense to incur all these huge losses to divert water over there. For example, you could"—and we spent a lot of time talking about this—"try to get more water down from the Upper Carson into Lahontan Reservoir to make up for diversions from the Truckee. Or you could come up with some kind of a water bank at Lahontan Reservoir that would allow a drought storage arrangement similar to what we've got going on on the Truckee." You know, What is water?

“ . . . the Carson Division of the project . . . 60-, 70 percent of the years they could exist on just the Carson River. So the Truckee River is a supplemental supply, is an insurance policy. . . . ”

What is Truckee River water for the Newlands Project? It's really an insurance policy for a drought year, because in most years now, the Carson Division of the project—I'm saying "most years," what is this? sixty, seventy percent of the years they could exist on just the Carson River. So the Truckee River is a supplemental supply, is an insurance policy. Well, you don't have to insure with water—water is a very inefficient way to insure. Why don't you insure with money? Why don't you have a kind of a crop insurance program that will reimburse farmers for the losses that are attributable to their not having Truckee

River water? If the goal—which they kept saying it is—is an economically viable agricultural community, then that can be achieved in other ways. So there are options that were out there, which I think could have been achieved.

Seney: This was options suggested during negotiations?

Pelcyger: Yeah. But I don't think it was ever seriously considered, because they could not realistically face the prospect of no more diversions.

Seney: Do you think that their position that they wanted 43,000 acres of prime agricultural land on a long-term basis is a realistic one?

Pelcyger: No. (pause)

Seney: You're shaking your head considerably here—an emphatic no.

TCID Has Missed Opportunities in the Negotiations, and Water Rights Acquisition for the Wetlands Is Going to Affect the Project as the Process Proceeds

Pelcyger: Right. I think that, my prediction is that the community, the Fallon community in particular, five years from now will look back at the 1994-95 round of negotiations and say, "You missed the boat," just like they're saying that now about what happened in 1990, that there were opportunities there that we could have [taken]. I think if you just look at the rate of acquisitions of water rights for the wetlands, they're going full speed ahead. And I think that there are things that are going to happen in the very near future that will make more and more people want to sell their water rights. You know, that's something else: when you talk to people at the Newlands Project, they say, "We're here and this is our quality of life and this is our heritage, and this is what we want to maintain and preserve." You don't hear people saying, "We want to sell our water rights." But in fact, people are voting to sell, and they're lining up in large numbers and there's not any trouble finding willing sellers for the wetlands water rights. And my prediction is that in a very short period of time, the amount of irrigated acreage will be considerably less than 43,000 acres, within five to ten years. And that at least on the wetlands water rights

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Seney: . . . on the wetlands purchase side.

Believes a Viable Agricultural Community Can Exist with 20,000 to 30,000 Acres and That TCID's Desire for 43,000 Acres Is Unrealistic

Pelcyger: Yeah, the negotiations offered an opportunity to put a cap on it, or to put a lid on it, and to make a real effort to maintain a viable agricultural base, which I think was more in the neighborhood of between 20,000 and 30,000 acres, not 43,000.

Seney: Well, there was even a suggestion, apparently, that got fairly far, to take the Harmon Reservoir and "S" Line Reservoir and include those in the wetlands calculations. Do you recall that?

Wetlands Issues During the Negotiations

Pelcyger: Yeah, you're getting into more sensitive areas.

Seney: What's sensitive about that?

Pelcyger: Well, just that we're not just supposed to characterize what took place during the negotiations.

Seney: Oh, alright. Well, I didn't sign that agreement.

Is that what you were getting at when you're saying that there was some movement on this wetlands business?

“. . . the wetlands people did indicate a willingness to try to come up with a . . . maximum cap on the amount of water rights that they would buy, so that that would leave a . . . sufficient agricultural base, for the Carson Division . . .”

Pelcyger: Well, and I think the wetlands people did indicate a willingness to try to come up with a number, a maximum cap on the amount of water rights that they would buy, so that that would leave a certain agricultural base, a sufficient agricultural base, for the Carson Division of the project. Right now there's nothing. And I don't know where it will stop, but I think it's in a free-fall condition.

Seney: Were you and the tribe really seeking anything in the negotiations? I know you had the decoupling in your proposal. What else did you have on your side that you were suggesting? Was there anything else besides that?

The Pyramid Lake Paiute Tribe's Proposals in the Negotiations

Pelcyger: Well

Seney: Now, you *can* characterize your own position.

Pelcyger: You read the ground rules!

Seney: I did! (laughter)

“. . . we were interested in getting agreement to . . . further and further reductions of diversions at Derby Dam . . . getting agreement to reduce the target storage levels . . . below what they were in the '88 OCAP. . . .”

Pelcyger: Well, we were interested in getting agreement to do certain things that at least would be steps toward, if not decoupling, at least further and further and further

reductions of diversions at Derby Dam—for example we were interested in getting agreement to reduce the target storage levels in the OCAP, below what they were in the ‘88 OCAP.

Seney: This is the storage levels of Lahontan Reservoir?

Pelcyger: At Lahontan, right. Did I say Lahontan?

Seney: No, but you said target storage levels below what they were in the ‘88 OCAP.

Wanted an Agreement with Fernley to Acquire Agricultural Water Rights

Pelcyger: For Lahontan, right. We were interested, and still are, in reaching an agreement with the Fernley community under which they would agree to cooperate in a water rights acquisition program for the agricultural water rights. We recognized that they had a legitimate interest in trying to improve, from a variety of standpoints, their municipal water supply. And so we were offering the possibility to them of locating wells on the Pyramid Lake Indian Reservation next to the Truckee River, which would be a more dependable, a safer, and a higher-quality water supply for Fernley.

Seney: And those talks are kind of going on, aren’t they?

Talks with Fernley Are Not Moving Forward

Pelcyger: I would say no. We thought that they would, we think that they should, but they haven’t been for the last six months or so. That’s a perfect example to me of a kind of a win-win situation with the Town of Fernley that should happen, and hopefully eventually will. So there were concrete things that we wanted to come out of the negotiations. They all had a common theme which was to further reduce [diversions from the Truckee].

The Lahontan Valley Environmental Alliance and its Relationship to the Agricultural Community in the Fallon Area

And we kept saying to L-V-E-A,¹² “You’ve got to look and see what your future’s going to be *without* a settlement, because we think most, if not all, of these things are going to happen anyway. But we think that there are ways to make them happen that would be more palatable to you, and also things that you can get in return as part of a settlement process that you wouldn’t be able to get without it.” We thought at one time, as you probably know, that there was an agreement which was an interim agreement—it was going to last for five years or thereabouts. Another thing is, we wanted the Newlands Project to achieve a higher efficiency, and to agree to achieve a higher efficiency, and we were prepared to offer ways to help them do that. And in the end, what, eight of the nine parties, I think, agreed to this interim solution that was on the table and was originally proposed by the

12. Lahontan Valley Environmental Alliance.

environmental caucus. But it was rejected by L-V-E-A, and in the end I think the answer to the question we had going in was that the agricultural interests did have their way, and did predominate, and the other interests were not able to—either unwilling or unable—to assert themselves, or at least assert themselves sufficiently to overcome the opposition of the agricultural interests.

Seney: I know you're not supposed to characterize anybody else's position, but as when you said in the end L-V-E-A rejected it, would it be more accurate to say that in the end the farmers rejected it?

Pelcyger: Um

Seney: Let me tell you what I've been told—I have my sources—never to be divulged, of course—is that as the negotiations went on, Lyman McConnell moved closer and closer to the table, and finally was at the table. And that the closer he got to the table, the more remote, perhaps, an agreement became—that that was symbolic of the increasing influence of the farmers who were there in the person of Ernie Schank with the Newlands Water Protective Association. But even within L-V-E-A itself, the viewpoint of the farmers began to dominate. Would that be a fair characterization, do you think?

Pelcyger: I don't know. Your other sources are more reliable on this one than I am.

Seney: I mean, I can understand your reluctance to discuss these things, and if you choose not to, no matter how clever my questions, I know I won't get it out of you.

Pelcyger: I don't want to talk about anybody personally.

Seney: And maybe I shouldn't have personalized it by mentioning Lyman McConnell, who I like, by the way, and who's always been very nice to me and very cooperative in what I'm doing, and I don't mean to bad-mouth him, because I think just as you're a very able advocate for the people *you* represent, I think he does a very good job by the people *he* represents as well. I mean, you two are at opposite poles, but you're both effective at what you do, so I don't mean to bad-mouth Lyman in this. But in trying to get a sense of what happened in the negotiations, as you say, eight of the nine parties had agreed to this. Is it seven of eight or eight of nine? Something like that. One did not, and it's clearly the agricultural interests.

Pelcyger: Well, it was L-V-E-A. L-V-E-A was the negotiating party. They had certain procedures under which if they wanted to L-V-E-A could have reached a position that was different than the [Newlands Water] Protective Association, which was sort of a component part of L-V-E-A, but (Seney: Kind of separate at the same time.) kind of separate at the same time. So when I said L-V-E-A, I think that was the critical [one]. I think if L-V-E-A had approved the deal and the Protective Association had not, we probably would have had a deal. Or I'm not sure what would have happened then. But they didn't, so for whatever reason. And I think different people probably felt different ways about it. And this is very difficult. Some probably felt that it would split the community and that people have to live

together, and their kids go to school together. So there are a lot of factors, but I don't think it was one person. And like any other organization, there are going to be differences of opinion, but in the end, what it came down to, the bottom line was that L-V-E-A qua L-V-E-A did not support the proposal, even though I think probably some other leaders felt that it was in the long-term interests of the community.

Differing Models Presented at the Negotiations

- Seney: I've been told too that one of the problems was that all the modeling that went on, that people really couldn't agree on the facts and the models. I mean you guys apparently had a model, and the government had a model, and Sierra Pacific had a model.
- Pelcyger: I don't think that was a problem.
- Seney: You don't think that was a big difficulty? That was not an insurmountable part of it, in other words?
- Pelcyger: No, I think, relatively speaking, given the complexity of the subject, that those differences were at the margin, and if there was a will to reach an agreement [it would have been reached]. I think the technical data base that we were working with and the modeling and the tools that we had were as good as they're ever going to be.

Sticking Points During the Negotiations

- Seney: What were the sticking points, from your point of view?
- Pelcyger: (long pause) I think the sticking point was that the Fallon interests were not willing to agree to decrease their dependence on the Truckee River. They see it as being their insurance policy. They see every drop of water for which diversions were reduced would increase their risk of what they call "artificial shortages." And they didn't want to agree to that.
- Seney: Do you see much of a future for negotiations between the tribe and T-C-I-D on things like maybe the abandonment and forfeiture business, or recoupment, or upstream storage? I mean, the recoupment's got to be solved before any upstream storage agreements can be made, according to 101-618. Right?

"Recoupment's got to be solved before a water bank can be instituted at Lahontan. But not on the Truckee River. It is very difficult for me to envision successful negotiations about recoupment or OCAP. . . ."

- Pelcyger: No. Recoupment's got to be solved before a water bank can be instituted at Lahontan. But not on the Truckee River. It is very difficult for me to envision successful negotiations about recoupment or OCAP.

Negotiations with TCID Would Likely Occur in the Context of TROA

I think if any negotiations are possible with T-C-I-D, it would be in the context of TROA. I think that that at least has some potential for being separated.

Seney: You meant the TROA negotiations will lead to negotiations with T-C-I-D?

Pelcyger: Well, T-C-I-D has an interest in TROA.

Seney: Are they participating in the TROA negotiations?

Pelcyger: Yeah.

Seney: Because I know when I attended that one meeting last year, they were not at the table at that point—at least in that one meeting, and maybe that was not the full meeting. They were in the back of the room with some others. Do they now sit at the table with the rest of you?

Pelcyger: Well, it depends what's the shape of the table. But there are a lot of TROA meetings.

Seney: And I'm not sure which one I was at. There've been so many I know that the one I was at won't stick out in your mind, because I know that there are sort of general meetings and then sub-meetings that go on.

“... the five . . . mandatory signatories: California, Nevada, Sierra Pacific, the United States, and the tribe . . . we can have an agreement with those five. And T-C-I-D . . . nothing . . . more symbolizes their fall from power as the fact that they are not required, they don't have a veto power, and that the tribe is there and they're not. . . .”

Pelcyger: Right. But they're invited to everything, except when the five major parties, the five who [are] the mandatory signatories: California, Nevada, Sierra Pacific, the United States, and the tribe [get together and that hadn't happened much]. Under the legislation we can have an agreement with those five. And T-C-I-D is not, which really rankles them, because I suppose nothing in some ways more symbolizes their fall from power as the fact that they are not required, they don't have a veto power, and that the tribe is there and they're not. When you think about it, and think of everything that's happened on the Truckee River, that's a pretty remarkable turn of events.

Seney: They *could* be included, though.

TCID “... could be included, and we would like for them to be included. And they are probably the only other party that could . . . upset the apple cart. They . . . [believe] things that the rest of us want to happen under TROA violate their rights. I don't think that their claims are worth anything, but they could be litigated. . . .”

Pelcyger: But they could be included, and we would like for them to be included. And they are probably the only other party that could or threatens to upset the apple cart. They could sue to prevent it from happening, because they have some claims to some things that the rest of us want to happen under TROA violate their rights. I don't think that their claims are worth anything, but they could be litigated.

Seney: They could be a nettle, in any case.

“ . . . everybody would like to have them be a part of it, and see if we can get these claims resolved and avoid litigation. . . .”

Pelcyger: They could be a nettle. And everybody would like to have them be a part of it, and see if we can get these claims resolved and avoid litigation. And so there'll be an effort to try to do that.

Seney: “These claims,” meaning the ones that you're currently pursuing?

Pelcyger: No, these are claims that T-C-I-D has raised primarily against Sierra Pacific, having to do with relative rights of Sierra Pacific, vis-à-vis T-C-I-D to store water in Donner Lake and to store water in Independence, and to store water in Boca. And for Sierra Pacific to be able to convert its excess agricultural rights and put it in storage, because if those water rights are not used T-C-I-D is the beneficiary of them, under the current arrangement.

Seney: If those arrangements were to be changed under this current TROA, then they might have standing to sue, they think. I see. So you'd like to draw them in, resolve those things, maybe use that as a stepping stone to resolve some of these larger issues then, you think?

Pelcyger: Well, anything's possible. But right now it's hard to imagine going beyond that.

Seney: Can you imagine the day the tribe's not going to need Bob Pelcyger anymore?

Pelcyger: Sure.

Seney: (chuckles) Can you really? Or do you see this stretching out for quite a distance here?. But are you going to “die with your boots on,” in a sense of this case do you think?

Pelcyger: Do you mean will I die before diversions cease?

Seney: Yeah, and before the questions are really resolved?

Pelcyger: Before . . .

Seney: And you're a vigorous man. Let me say I see twenty-five years anyway here, as I'm looking at you.

Pelcyger: How old are you?

Seney: Fifty-five.

“ . . . the Truckee River is a great place to learn history. And one of the things you learn is how bad everybody’s been about predicting the future. . . .”

Pelcyger: I’m going to be fifty-four in a couple of months. (pause) I don’t know. One of the things that you learn—you’re a professor—the Truckee River is a great place to learn history. And one of the things you learn is how bad everybody’s been about predicting the future. And I certainly wouldn’t have predicted five, ten years ago that we would be where we are today.

Seney: So well-off you mean?

Pelcyger: Yeah.

Seney: Relatively speaking, yeah.

Pelcyger: So I don’t think about it. Really, I don’t think about it personally. I don’t think, “How much time do I have to go?” or anything like that.

Seney: I’m not really putting it [like] that. I’m just putting it in that context to ask you this question, do you think you see an end to these things, or do you see them going on for some considerable time?

“ . . . I see an end to them, but I don’t know when . . . I think in the next couple of weeks you’re going to see the Federal government file a recoupment lawsuit. I think in the next couple of weeks or months you’re going to see some of the largest and best-known farms of the Newlands Project have their water rights acquired. . . .”

Pelcyger: No, I see an end to them, but I don’t know when, or whether I’ll be around. But I feel comfortable that we’re on the right road, and I feel that things are accelerating. I think in the next couple of weeks you’re going to see the Federal government file a recoupment lawsuit. I think in the next couple of weeks or months you’re going to see some of the largest and best-known farms of the Newlands Project have their water rights acquired.

Seney: There’s some sales pending, in other words?

The Tribe, Reno, Sparks, and Washoe County Are Nearing Agreement on Water Quality Issues

Pelcyger: Yeah. And I think you’re going to find in the next several weeks that the tribe and Reno and Sparks and Washoe County have reached an agreement on this water quality, which is going to be a big boost to Truckee River water right acquisitions. You’re going to see California becoming more active, California interests, and

recognizing that the less water that goes out of Derby Dam, the more water there is to satisfy their needs upstream.

“ . . . I think you’re going to find some of the subsidies that have helped carry the Newlands Project, and carry the farmers in particular, are going to be reduced or eliminated. . . .”

And I think you’re going to find some of the subsidies that have helped carry the Newlands Project, and carry the farmers in particular, are going to be reduced or eliminated.

Seney: This is out of the new contract negotiations with the Bureau?

A New Federal OCAP Is Likely to Reduce Truckee River Diversions by 60 to 65 Percent Soon and Even More in the Future

Pelcyger: Right. I think you’re going to see that the Federal government is going to initiate revised OCAP, adjusted OCAP that will reduce the target storage levels of Lahontan Reservoir. I think you’re going to see a new pricing program come into the Newlands Project. First of all, water will be more expensive, and there’ll also be incentives for conservation, better measurements. Well, let’s say from 1905 to 1967, Newlands Project diversions averaged 250,000-, 240,000 acre feet a year. I don’t know whether we talked about these numbers already.

Seney: A little bit last time, off the Truckee.

Pelcyger: Off the Truckee. If you use that same hydrology and look at the conditions that are in place right now, today, it would average about 100,000 acre feet. So that’s a reduction of, what, sixty-, sixty-five percent. I think with the things that are on the table right now, within the next five years it should be reduced to somewhere less than 50,000 acre feet.

If Diversions Fell to 50,000 Acre Feet, 40 to 50 Percent Would Be Lost During Transportation

And when you get to those numbers, you’ve got to start scratching your head when you realize that of those 50,000 acre feet, 20,000 to 25,000 acre feet is lost. So I think at some point you’ve got to scratch your head and say, “Is it worth it?” Or reach the conclusion that it’s not worth it, and that it doesn’t make sense, any kind of sense.

Seney: Is there anything I haven’t asked you, or you haven’t said that we need to say?

Pelcyger: Not that occurs to me right now. (laughter) But feel free to, as you pursue things, I’ll be happy to talk to you over the phone or rendezvous here.

Seney: Okay, good. Well, I really appreciate it. You know, this has been really illuminating, and I kind of wish you’d been a little more forthcoming on the

Settlement II negotiations, but I can understand that you feel a little bit inhibited to discuss what other people were doing there. It's kind of hard to get a grasp of what went on in those negotiations. Not everyone has been reluctant, let me say—some of the participants have been more than willing to speak out (Pelcyger: Well good.) on what's happened.

“ . . . I try to understand where other people are coming from and put myself in their position. And I do recognize that it's very difficult for them. . . . ”

Pelcyger: I take a different tack, I think. First of all, I try to understand where other people are coming from and put myself in their position. And I do recognize that it's very difficult for them. I mean, facing the change that They are facing.

Seney: You know, come to think of it, I think maybe that you've said enough that we'll be able to understand, when we read the words, what you mean.

Pelcyger: Yeah. But the other thing is that you have to look at the negotiations realistically, I think, from the beginning. And I didn't have any great expectations that they would succeed. I look at it from the standpoint that chances are that they won't succeed, and if they succeed, that's great, that's unexpected. That's a big surprise and that would be wonderful. But not to go in with great expectations. And not to blame people if they failed, because it's so hard. I mean, you have to be very lucky for them to succeed. So it's not a question of blaming people if they fail. And nothing really bothers me more—and I think nothing has led to more ill will between the Pyramid Lake community and the Fallon community—than statements blaming who was at fault and who lies and who does this and who does that. First of all, I don't think it's true, because as I say, it doesn't have to be anybody's fault. The odds are against you, and it certainly doesn't help.

Seney: Well, I really appreciate, on behalf of the Bureau, your willingness to give us six hours of your time.

Pelcyger: I think this is a great project.

Seney: Good.

Pelcyger: And I'm looking forward to seeing the transcript. I was thinking after the last time that I would at least offer members of the tribe to have it, because it's *their* history, very valuable.

Seney: Sure. Well, I'll be talking to some of them, and they'll be able to make a contribution too. Alright, well, thanks again.

Pelcyger: Okay.

END SIDE 2, TAPE 2. SESSION III. OCTOBER 10, 1995.
BEGIN SIDE 1, TAPE 1. MAY 3, 2006.

Seney: [This is Don Seney with] Bob Pelcyger, Robert S. Pelcyger, I may change your name for you in Reno, Nevada, this is our third session and our *first* tape. We actually began talking in 1995 and today is May 3rd, 2006.

So, Bob, I'd like you if you would to talk a little bit about in the period since we've talked it's been eleven years, and I think *most*, though not all of that has been taken up with the TROA [Truckee River Operating Agreement] negotiations. And maybe there've been some other issues. (Pelcyger: A lot of other issues.) There have been. Okay, well good, good, then I want you to talk about those too, but maybe a little bit about how it is to work with the [Pyramid Lake Paiute] Tribe in terms of changes in leadership and kind of the continuity of viewpoint the tribe has toward the water issues.

“ . . . the amazing thing to me is how stable the tribe has been politically, and especially with regard to the water issues. And I say that in comparison to a lot of other tribes . . . ”

Pelcyger: Well, the amazing thing to me is how stable the tribe has been politically, and especially with regard to the water issues. And I say that in comparison to a lot of other tribes, both that I have worked for and also that I know about that water has never . . . how am I going to put this.

“There have been some internal controversies within the tribe . . . but overall the tribe's commitment has been steadfast . . . ”

There have been some internal controversies within the tribe, but the tribe has really never wavered politically. They haven't gone back and forth. There have been some dissenters along the way who have questioned the settlement and other things, but overall the tribe's commitment has been steadfast, and through some difficult times.

After the Supreme Court Refused to Support a Prior Water Right for the Tribe in 1995, the Tribe Turned to less Direct Ways to Obtain Water for Pyramid Lake

“ . . . the tribe regrouped and there was another strategy which could be pursued which ultimately turned out to be, I think, much more successful than what would have happened if we had won the Supreme Court case. . . . ”

This isn't since 1995, but we lost the Supreme Court case (brief blank space) and all these years of effort had seemingly come to an end in defeat, but the tribe regrouped and there was another strategy which could be pursued which ultimately turned out to be, I think, much more successful than what would have happened if we had won the Supreme Court case.

Seney: And that other was the negotiated settlement?

Pelcyger: Well, the “negotiated settlement,” but it was . . . what led to the negotiated settlement was a strategy under which when we no longer could assert a prior water right that

would be prior to everybody else's and then try to quantify that, which would have had its own problems, (blank space on tape) the ultimate strategy which had been in place first, actually, was to try to obtain water for Pyramid Lake is less direct ways.

“ . . . things . . . more like a guerilla warfare instead of one large offensive which would have put the tribe's right at the head of the list, but then we would have had to quantify how much water you would have been entitled to to fulfill this *Winters Doctrine* right—if it had been found not to have been diminished as a result of the Orr Ditch Decree. . . .”

By cutting back on what other people could divert, by (Seney: Right.) obtaining a controlling interest in Stampede Reservoir and many other things that came about to sort of it was more like a guerilla warfare instead of one large offensive which would have put the tribe's right at the head of the list, but then we would have had to quantify how much water you would have been entitled to to fulfill this *Winters Doctrine* right—if it had been found not to have been diminished as a result of the Orr Ditch Decree.¹³ Instead of pursuing a more direct approach instead we were back channeling through the OCAP [Operating Criteria and Procedures], for example, at the Newlands Project and reducing significantly the amount of water that was diverted to the Newlands Project, insisting that there be water meters in Reno and Sparks, conservation, entering into a water quality settlement agreement under which water rights were acquired for the benefit of the lake, and various other ways. A whole bunch of different ways to try to obtain the same or better result. But, in any event, getting back to the politics, the tribe has been steadfast.

“ . . . this is a cultural thing for the tribe. . . . life emerged from Pyramid Lake in their mythology. And they view themselves as the stewards of the lake. . . .”

They have . . . you know, this is a *cultural* thing for the tribe. They view Pyramid Lake as being . . . all their culture, all their myths, they call themselves, of course, the Qui ui Eaters, *cui-ui tucutta*. Pyramid Lake is the . . . *life emerged* from Pyramid Lake in their mythology. And they view themselves as the stewards of the lake. And so its been a real unifying, a real unifying factor—that is, who the people are. Sometimes there'd be differences of opinion about what to do, which is natural enough.

It Is Important for Tribal Leaders to Understand and Speak up about These Complex Water Issues

These are complex issues. (Seney: Right.) But, for the most part . . . now having said that, naturally you get different leaders at different times who had different degrees of familiarity with the water issues. Different levels of interest. And so that's been somewhat difficult to navigate because somebody'll become a chairman all of a sudden, and they won't have any previous exposure and it's easiest, I think, for tribes' attorneys/consultants to work with leaders who are knowledgeable. And there are certain times when it's very important for the leaders to speak out at meetings

13. The Orr Ditch Decree is a Federal adjudication of water rights on the Truckee River in Nevada and California. The decree is implemented by a Federal watermaster working for the local Federal District Court.

(Seney: Right. Sure.), and you've been there and as opposed to hearing the same old, same old from the same familiar faces . . . (Seney: Meaning *yourself* in this case.) meaning me or meaning Ali [Shahroody]¹⁴ or particularly me. (Seney: Right.) And there have been some times there have been some tribal leaders who . . . what's the right word . . . ~~who didn't~~ who wanted to change the perception that the tribe's identity was merged with non-tribal members—me, and Ali, and others—experts, and they felt that *they* wanted to be, certainly, the public face of the tribe. That didn't happen very often, but sometimes it did. And we tried to work with that. And that's, again, something to be expected, but there's never been a . . . there's never been any backtreading, there's never been any significant change in policy. They've been very united.

“The one thing everybody in that tribe would agree to is that the Truckee Canal should be closed, and that's been a tremendous unifying force. . . .”

The one thing everybody in that tribe would agree to is that the Truckee Canal should be closed, and that's been (Seney: Right, right) a tremendous unifying force.

“. . . I've worked for a lot of different tribes, and one of the best things about the Pyramid Lake [Paiute] Tribe is that they know what they want. . . .”

And, *for me*, one of the . . . I've worked for a lot of different tribes, and one of the *best* things about the Pyramid Lake [Paiute] Tribe is that they know what they want. A lot of tribes, particularly in the water area, you know, they know they don't want to be subject to state jurisdiction, they *know* they want as much water as possible, but they don't know what to do with it, or they're not as clear-cut in their goals, and it's very hard for a lawyer or anybody to work (Seney: Right.) with a client that doesn't really know what it wants. But at Pyramid Lake that's never been a problem.

Seney: There are things that the tribal members quarrel about that would be outside of your purview. Things that would make up sort of the political squabbles within the tribe itself. I expect how the tribal police behave. Would that be one of them.

“. . . the law enforcement functions, social services, those things are very difficult for most tribes. . . .”

Pelcyger: Yes, but I think courts and police, the law enforcement functions, social services, those things are very difficult for most tribes.

Seney: Who gets what, and . . .

Pelcyger: Yeah, and you know when it comes to tribal courts and adjudicating whatever squabbles come up between tribal members or within families or child custody matters, those are very difficult because everybody knows everybody, and they're related to everybody, and they all go back generations, and they remember what their grandmothers and grandfathers were doing and (Seney: And arguing about.) and

14. Ali Shahroody contributed to Reclamation's oral history work on the Newlands Project.

arguing about and it's very hard for a small community to maintain the kind of objectivity and distance that those kinds of institutions require, at least in today's world. And that's been . . . those have been police, ~~those~~ (Seney: Right.) ~~have been~~ law enforcement problems have been difficult.

Seney: So do to the extent they quarrel it's more about these things than about water issues?

Pelcyger: Yeah, quarrel and also—and it's quarreling, but it's also just not so much taking different positions on the issues but just about the failure of those institutions to properly perform their job (Seney: Right.) and who's responsible for that and whether somebody could do a better job.

Seney: Right. Right. I do know that at the end of Joe Ely's tenure, when he was defeated, it wasn't really over . . . the water issue had been really a success. . . .

Pelcyger: Yeah. He wasn't defeated . . .

Seney: I guess he didn't run again did he.

Pelcyger: Yeah, and they have a term limit.

Seney: That's right. That's right. But when he was reelected wasn't it really close when he . . .

Pelcyger: I don't remember. I wouldn't be surprised.

Seney: Yeah. I'm reflecting on the interview I had with Joe some time ago, and he said "Well the water didn't really cut it so much as these other quarrels and squabbles and so forth . . .

Joe Ely " . . . said 'You know Bob, I don't know any successful Indian politicians who've run on the platform "Let's make another deal with those White guys."'"

Pelcyger: He said something once to me that I've remembered for a long time and quoted it many times. He said "You know Bob, I don't know any successful Indian politicians who've run on the platform 'Let's make another deal with those White guys.'" (Laughter.)

Seney: Yeah. I'm sure that's true.

Pelcyger: So, you are climbing uphill when you basically, I think generally speaking, I'm not sure that this is still the case, because, but there was a time when tribes felt that the institution in the dominant society that would give them the best shake were the courts and that any kind of a deal smacked of a compromise and certainly the history of Indian relations and deals with White men . . .

Seney: Would give them cause to believe that.

“ . . . and . . . the deals . . . even if they were decent to begin with, they were . . . Almost never honored. . . .”

Pelcyger: Absolutely, and especially the deals were never, even if they were decent to begin with, they were never honored.

Seney: Right.

Pelcyger: Almost never honored. So there's a healthy skepticism, and it took a while, which I think they now have, to feel enough confidence that they would be able to come out . . . that the deals would be good for them. That they knew enough in their own judgement, I don't know if confidence in the people who were working for them, to feel that this was something that they could do with confidence and they weren't going to get screwed again.

Seney: Right. Right.

Pelcyger: But I think now they have . . . people are amazed when they go out to . . . people who have been to a lot of different tribal councils and appear before the Pyramid Lake [Paiute] Tribe for dealing with the water issue and they just shake their heads in amazement that it's such a knowledgeable . . . refined questions that they get, and the level of the discussion is amazing considering the complexity of the subject and the fact that these are essentially volunteers (Seney: Right.) and they're not paid . . . they have full time jobs and this is . . . but it is deeply ingrained in the society and in the culture.

Seney: All right. Great. What have you been dealing with in these last ten years. Why don't you tick off the issues and tell me about them?

Dealing with TROA

Pelcyger: Well, TROA, of course, is one, (Seney: Right.) and you know about that. And it's gone painstakingly slowly, and there have been some bumps along the way, but we've always come out of them. We have another one now.

Implementation of the Settlement Act

There have been other issues relating to implementation of the Settlement Act—other provisions of the Settlement Act.¹⁵ Things like . . . there is a provision that directs the Navy to develop and implement a plan to reduce or eliminate its use of Newlands Project water rights to irrigate—to keep a green field around the runways and so forth. That's one example . . .

Seney: They claim they *need* that for jet engine safety. Not sucking up dust. Is there something else they could do? Are they moving on that at all?

15. See footnote on page ?.

Dealing with the Navy's Water Rights at the Fallon Naval Air Station Is Difficult

Pelcyger: Well, they did give up eight hundred acres or so, and that's still going on. We're now trying to . . . because that was part of the deal that was incorporated in the Settlement Act that Pyramid Lake would get the benefit of that water in return for which the tribe agreed to this interstate allocation between California and Nevada. Which basically more water for California which could result in less water for Pyramid Lake, and the compensation for that was supposed to be and *is* the Navy water rights. But, there are many other airports and military facilities, military bases, that don't have green fields and don't have irrigated lands around their jet planes and just do fine.

Seney: How is the Navy to deal with?

“ . . . if it weren't for Senator Harry Reid, who always has things the Navy wants . . . it wouldn't be possible to deal with them. . . . They don't pay attention when Congress directs them to do anything. They just do what they want to do and don't do what they don't want to do. . . . ”

Pelcyger: Very hard. And if it weren't for Senator [Harry] Reid, who always has things the Navy wants, whether its confirmation of an admiral, or a golf club for the officers, or whatever it is, it wouldn't be possible to deal with them. They're impossible. They don't pay attention when Congress directs them to do anything. They just do what they want to do and don't do what they don't want to do.

Seney: But Senator Reid has been steadfast in . . .

“ . . . one of the major things that happened during this period was that in 1997 the Bureau of Reclamation issued what we call “adjusted OCAP” which significantly ratcheted down further on diversions to the Newlands Project from the '88 OCAP that had preceded them. . . . ”

Pelcyger: Yes. He's been a champion. The OCAP are a continuing issue.

You know, they were—one of the major things that happened during this period was that in 1997 the Bureau of Reclamation issued what we call “Adjusted OCAP” which significantly *ratcheted* down *further* on diversions to the Newlands Project from the '88 OCAP that had preceded them. And that was a *major* benefit.

Seney: How much less water are they taking now.

Pelcyger: Well, compared to what?, or to 1988, or compared to when we started or . . .

Seney: Well, I suppose . . .

Pelcyger: I can give you some rough numbers.

Seney: Yeah, would you, sure . . .

Water Use of the Newlands Project Between 1915 and 1967

Pelcyger: Well, from roughly the time that the major features of the Newlands Project was completed in about 1915 through 1967 or so, that was a period when the level of the lake went down eighty feet, the Newlands Project was utilizing roughly, they didn't keep track of it, but roughly 450,000 acre feet of water a year from the Truckee and Carson rivers. Of which about—more than half, 240-, 250,000 acre feet came from the Truckee River. The average annual diversions during that period of Truckee River water to the Newlands Project was about 240,000 acre feet. About half the flow of the river. And the water was being diverted all the time without any regulations or controls, and it was—the decrees, which provided for 3.5 or 4.5 acre feet maximums to be delivered, it was 8-, 9-, and 10—water was frequent . . .

Seney: You're talking about acre feet of water per acre of irrigated land.

Pelcyger: Delivered at the headgate, yeah, and it's much more than that if you take it all the way back to the reservoirs (Seney: Right.) and account for evaporation and distribution system [losses].

“ . . . there was no control on how much Truckee River water went to Lahontan Reservoir . . . ”

And there was no control on how much Truckee River water went to Lahontan Reservoir, you know, of course Lahontan, its primary source of water is from the Carson River, and the Truckee River is supposed to be a supplemental source.

“ . . . water was being released during the winter time for single purpose hydroelectric generation even as more Truckee River water was being diverted . . . ”

But the way it was operated the ~~Truckee River~~ the Truckee Canal was full practically all the time, and water was being released during the winter time for single purpose hydroelectric generation even as more Truckee River water was being diverted, water was being released not for irrigation but for single purpose hydro or whatever.

“ . . . if you superimpose over that same period the conditions that are in place now, including the OCAP and the other reservoirs and all the controls, the average annual diversion would be around 70,000 acre feet. . . . and the total amount of water that is used on the Newlands Project, instead of 450,000 acre feet is more like 270-, 280- something from both rivers. ”

But, now if you superimpose over that same period the conditions that are in place now, including the OCAP and the other reservoirs and all the controls, the average annual diversion would be around 70,000 acre feet. (Seney: Is this from the Truckee River?) From the Truckee River, and the total amount of water that's used on the Newlands Project, instead of 450,000 acre feet is more like 270-, 280- something from both rivers. (Seney: Right.)

“ . . . [recent] analysis . . . look[ing] over a long hydrologic period . . . Truckee River diversions to Lahontan Reservoir . . . Diversions in only 30 percent of the months and that keeps going down. It’s getting lower and lower, so the goal of closing the Truckee Canal is not that far from being realized . . . ”

And there, Ali actually did an analysis, this surprised me, a couple of months ago, which indicated that, under existing circumstances, the times, if you look over a long hydrologic period, the number of months in which there are Truckee River diversions to Lahontan Reservoir, I’m not talking about the Truckee Division, now, just the Lahontan Reservoir, that 70 percent of the months there are no diversions. Diversions in only 30 percent of the months, and that keeps going down. It’s getting lower and lower, so the goal of closing the Truckee Canal is not that far from being realized, and [reducing] more than two thirds of the diversions from 240,000 acre feet to 70,000 acre feet is quite substantial. And there’s never been any contention, really, that it’s cut down on the amount of the yield of the project or the income to the . . . it’s just more efficient management and elimination of waste.

Seney: How is this . . . Are you talking about the ‘97 OCAP, (Pelcyger: Yes. Adjusted) Adjusted, I’m sorry, OCAP. What was the negotiation that went on to get that. How did you . . . what role did you play, and where was the Bureau of Reclamation in this and where was the Newlands Project. Was this something you negotiated out?

“ . . . the Bureau of Reclamation unilaterally imposed it [1997 OCAP], as a regulation, on T-C-I-D which never agreed to it. . . . ”

Pelcyger: Well, it was the tribe and the Bureau of Reclamation that . . . and the Bureau of Reclamation unilaterally imposed it, as a regulation, on T-C-I-D which never agreed to it.

Seney: Because I know you’re knowledgeable about and very active in this OCAP business because the yield, as you point out, has been substantial.

The 1988 OCAP Assumed an Increase of Irrigated Acreage on the Project

Pelcyger: Well, the key factor was that, and this sort of grew out of the second generation negotiations when *they* failed, (Seney: The so-called Settlement II negotiations in ‘94?) Right, ‘94-‘95. If you go back to the ‘88 OCAP, the ‘88 OCAP presupposed that a certain amount of land would be irrigated at the Newlands Project and started out, I can’t remember the numbers, but it was going to increase from ‘88 through the next five or six years, it was going to increase.

The Various OCAP Established Storage Targets for Lahontan Reservoir That Determined, by Month and Water Conditions, the Amount of Water to Be Diverted from the Truckee River into the Reservoir

And, in addition to that, one of the most vital parts of the OCAP are the Lahontan storage targets. And basically they tell you how much—they tell you *when* you can and *how much* water you can divert from the Truckee River to Lahontan Reservoir.

And the idea is that at different months of the year, depending upon where you are in sort of the irrigation cycle, you needed different amounts of water to provide enough water for that year and to carry over til the next year. And if you can get all that, if you can reach those targets from the Carson River, then you don't divert from the Truckee River. And if you need *some* water from the Truckee River, then you can divert that much, but only up to the target for that month. (Seney: Right.) And, the targets that had been set in the '88 OCAP, the storage targets, were geared to how much water was needed to irrigate this amount of land that they *projected* was going to be irrigated. Well, those projections were never met, but nevertheless the OCAP were geared to basically provide more land to be irrigated and therefore more water to irrigate those lands than had proved to be the case, and so the main function, there were some others as well, but the main function of the '97 OCAP was to, and that's why they call it adjusted, to adjust the acreage, and they provided a formula under which the storage targets would correspond to the acreage. So that as the acreage went up the storage targets would go up because you would need more water to irrigate more land. (Seney: Right, right.)

“As the acreage went *down* . . . then the storage targets went down . . . we estimated . . . probably 20- or 30,000 acre feet *average* per year . . . additional water that flows to Pyramid Lake . . .”

As the acreage went *down*, they were much more fine tuned, then the storage targets went down, and so we estimated there was probably 20- or 30,000 acre feet *average* per year that is *not* diverted or that additional water that flows to Pyramid Lake because of the Adjusted (Seney: Ah ha.) OCAP.

Seney: You know it was very interesting. I mentioned to you earlier that when I started doing the interviewing I started interviewing out on the project interviewing the farmers, and I asked how many acres are being irrigated, and they really couldn't tell me. Which really surprised me. I thought, “They must know.” Now, at this point, do they have a better grasp, do you have a better grasp of how many are being irrigated, and (Pelcyger: Yes, yes.) you know now?

Pelcyger: Yes, and *they* know. And one of the pretty amazing things. But one of the things that happened in addition to the change in the OCAP is that this period, certainly since 1995, and even more recently, I'd say the last five or six years, we've been very much involved in implementing the OCAP.

“. . . for a long time T-C-I-D, the OCAP were on the books, and T-C-I-D ignored them. And we're going to talk about the recoupment litigation in a minute. . . .”

Because you know for a long time T-C-I-D the OCAP were on the books and T-C-I-D ignored them. And we're going to talk about the recoupment litigation in a minute. (Seney: Yes, yes, absolutely.)

“. . . OCAP don't mean anything in wet years and dry years because the whole purpose of OCAP is to restrict the amount of Truckee River water that gets diverted. . . . during dry years there's not enough water . . . The limitation is the

physical resource. And in wet years . . . Lahontan is spilling so they're not diverting Truckee River water. . . ."

And then there were a number of years, even, when they started to comply with the OCAP they were either very wet years or very dry years, and OCAP basically aren't—OCAP don't mean anything in wet years and dry years because the whole purpose of OCAP is to restrict the amount of Truckee River water that gets diverted. Well, during dry years there's not enough water, even if you divert the whole thing. So OCAP are not a factor. The limitation is the physical resource. And in wet years, like this year, for example, Lahontan is spilling and so they're not diverting Truckee River water. ~~So it's only . . . I forget the exact date, but they had the drought years, they had a series of wet years, and well~~ They had dry years in the early '90s, that was the sort of '84 to '94 was a very dry period.

“. . . beginning about '98-, '99, 2000 they really began to enforce the OCAP . . . for the first time really, T-C-I-D has been forced to pay attention and to comply with the Bureau of Reclamation's directions. Previously they would enter into contracts and they would ignore them, and the OCAP they would ignore. And that's been part of the problem, they were a law unto themselves . . . and were amazed . . . when Congress, and particularly the Nevada congressional delegation quote betrayed [unquote] them by supporting the Settlement . . ."

Then they had a very wet period. And then they had a dry period again, something like that, and so there never came a time when you had to be serious about the OCAP, but beginning about '98-, '99, 2000 they really began to enforce the OCAP, and that's been hard work, and then the Bureau of Reclamation has done a very good job and Betsy Rieke,¹⁶ in particular, you know when she came back, (Seney: Right, right.) which is an amazing story. She's taken that very seriously, and, for the first time really, T-C-I-D has been *forced* to pay attention and to comply with the Bureau of Reclamation's directions. Previously they would enter into contracts and they would ignore them, and the OCAP they would ignore. And that's been part of the problem, they were a law unto themselves which is why they felt free to ignore the OCAP, and were amazed, and that's part of . . . they were startled when Congress, and particularly the Nevada congressional delegation quote betrayed [unquote] them by supporting the Settlement over their opposition. And that was a revolution. They were the ones who always were in control.

Seney: So Betsy Rieke has been a key player . . .

Betsy Rieke

Pelcyger: Very much a key player, and especially with regard to the OCAP, and she was instrumental also in . . . No she wasn't. I take that back. I don't think she was there in '97 when the OCAP were adjusted. But when she came in, and she'll tell you when, in '98-, '99, [or] something.

16. Elizabeth (Betsy) Rieke contributed to Reclamation's oral history work on the Newlands Project.

“ . . . one of her signal achievements, certainly from the tribe’s standpoint has been to implement the OCAP which hasn’t been easy. They are not very well written, and they are subject to a lot of disputes . . . ”

But, one of her signal achievements, certainly from the tribe’s standpoint has been to implement the OCAP which hasn’t been easy. They are not very well written, and they are subject to a lot of disputes where we have some issues right now in fact that are going on about interpretation of OCAP. But she’s consulted regularly with the tribe, and she has been very fair.

The 1988 OCAP and Water Efficiency on the Newlands Project

We haven’t always agreed, but it’s been a major step forward, and then, and T-C-I-D, I have to say, has become very efficiency conscious, and there was a provision that was added to the OCAP in ‘88 I remember that I thought was crazy and would never work. It was called . . . well, it was an incentive credit or a debit system. The idea was that it set certain efficiencies for the project, and it rewarded them if they exceeded those efficiencies and penalized them if they didn’t.

Seney: What form did the rewards and penalties take?

Pelcyger: Water. (Seney: Water.) If the debits built up to a certain point then they would have to reduce the amount of water that they were entitled to, and if they exceeded the efficiency then they would be able ~~to get~~ to keep extra water in Lahontan Reservoir that they could use for any purpose. And I thought that was.

“ . . . T-C-I-D really . . . improved their management to have regularly exceeded the efficiency targets. . . . ”

First, *I* thought it was dubious legally, but more importantly I felt like it was never going to work and it was going to add confusion, but I was wrong, and T-C-I-D really, I’m not sure why, but they really improved their management to have regularly exceeded the efficiency targets. That’s an issue right now because they kept the water in Lahontan Reservoir about 25-, 30,000 acre feet of water that sort of sits on top of Lahontan Reservoir. They had offers to lease that water, or to sell it, or to do other things with it which they were entitled to do, but they wanted to keep it there to use it to pay back the recoupment. And now, because of the weather, it’s spilling.

Seney: And that’s the water that’s spilling?

Pelcyger: Well, that’s part of the controversy . . .

Seney: That’s the question, huh?

Pelcyger: So, let’s see. So definitely Adjusted OCAP in ‘97 and continuing monitoring of the . . .

Seney: So, let me see, I’m sure you’ve put this ~~correctly~~, clearly, but Betsy Rieke then comes

to you on a regular basis to let you know how OCAP is going and what they're enforcing and what they're not en . . . So that gives you a hand in it so you can keep an eye on it on an ongoing basis . . .

“ . . . this last December was the first time in December, January, February and into March, there were no diversions *at all*. The Truckee Canal was just closed. . . ”

Pelcyger: Right. Right. Well it's not just Betsy also comes, but also we get, you know, you go on the internet, and you can tell how much water is being diverted from the Truckee Canal. We reached a milestone last December when, for the first time, there was no water being diverted from the Truckee River, even during the wintertime. And even when they weren't supposed to get water to the Lahontan Reservoir because the storage targets would be . . . this was another this has been another issue that has been going on. T-C-I-D claimed that they needed water to divert for stock—stock water during the wintertime from the Truckee Canal in the Fernley area. We call them the phantom stock because we never saw any stock, and nobody ever documented any stock. So we were always concerned about that because stock require a minimum amount of water, but charging the Truckee Canal, you know, that always seeps, it's very inefficient, and if you lose a lot of water for phantom stock, but so that was . . . But this past December was the first time in December, January, February and into March, there were no diversions ***at all***. The Truckee Canal was just closed.

Seney: Could those phantom stock diversions have had something to do with groundwater supplies in Fernley? Recharging the groundwater?

Pelcyger: It's possible. I mean, they certainly did that. I'm not sure that was T-C-I-D's motivation. I think T-C-I-D's motivation was to keep water in the Truckee Canal, but we were after the Bureau of Reclamation to send somebody out there to find out where the stock were and ***then*** to find out if there was a much more efficient way to provide water for these various stock.

“Another major issue was recoupment, and in 1995 the Federal government, as was provided for in the Settlement Act, sued T-C-I-D for more than a million acre feet of water that had been illegally diverted from 1973 to 1987 when T-C-I-D was thumbing its nose at everybody. . . .”

Another major issue was recoupment, and in 1995 the Federal government, as was provided for in the Settlement Act, sued T-C-I-D for more than a million acre feet of water that had been illegally diverted from 1973 to 1987 when T-C-I-D was thumbing its nose at everybody. There were extensive pretrial proceedings, and that case went to trial, I think, in 2002. The tribe intervened. Decision was issued in 2003 which is now on appeal. Both sides were not completely happy with the decision. We got ***much less*** water. The judge awarded about 200,000 acre feet of water . . .

Seney: About a million fifty-eight thousand acre feet was the . . .

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Pelcyger: Yes, and that case is on appeal now, the recoupment case, and . . .

Seney: How did the judge, do you think, got to that 200,000 plus or minus.

Pelcyger: That's, of course, an issue in the appeal, but there was disputed expert testimony, and T-C-I-D claimed that the gauges were in error and that the doubt should be resolved in their favor because the burden should be on the plaintiff to establish what the true readings were, and the judge . . . (Seney: Actually, by don't we pause just a second . . .) It's fine. It's up to you. (Seney: Yeah, go ahead and talk.) The amount was lowered because the government didn't do things. Sort of the government was penalized for not doing things in a timely way or in a way that the judge thought they should be done when the Alpine Decree¹⁷ was finalized. These get to be pretty complicated and complex matters, but those are issues on appeal. We are also trying to see if we can settle the recoupment case. Have a conference the week after next with the Ninth Circuit mediators. But that's taken up a lot of effort and time.

Seney: What do you think about the possibility for settling it, and what are the numbers you're looking at?

Pelcyger: I can't tell you that.

Seney: Oh, I'm sorry. No, I'm sorry. Of course you can't, and I don't mean to pry into your legal strategy, of course, here. Which I'll immediately sell to T-C-I-D, right. But I take it you'd want something more than the 200 you'd hope for. Say the number you would take to them.

Pelcyger: Well we have actually some interesting ideas, and . . .

Seney: Well, tell me what you feel you can tell me about it.

The Final Judgement in 2005 Award Interest on the Water to Be Repaid in the Recoupment

Pelcyger: Well, we have this judgement now, and one thing that is happening is that judge awarded interest. He didn't award pre-judgement interest, but awarded interest from the date of the final judgement, which was 2005.

Seney: So interest in the form of more water?

Pelcyger: Of more water, right. Which is a big concern to T-C-I-D and they've also had a difficult time trying to figure out how to repay the 200,000 with interest. For example, they can only repay, I mentioned to you before, that 70 percent of the

17. The Alpine Decree is a Federal adjudication of water rights on the Carson River in Nevada and California. The decree is implemented by a Federal watermaster working for the local Federal District Court.

months there's no Truckee River diversions are allowed to Lahontan Reservoir.

The Only Way TCID Can Repay Water Is When They Are Entitled to Divert Water from the Truckee River, and Interest Continues to Build on the Court Judgement

Well, you can only repay . . . ask yourself the question how does T-C-I-D repay water in the Truckee River. Well, the only way they can repay is when they are entitled to divert. So, if they're not entitled to divert, you can't be in repayment. So last year, for example, which was the first year the judgement was enforced, for a period of time in December, about ten days in December, under the OCAP, T-C-I-D was entitled to divert. And so you forego the diversions and that's how Pyramid Lake gets . . . that you'd otherwise be entitled. There has to be a baseline, in other words. (Seney: Right.) And (Seney: So if they had foregone that diversion that could have been credited against . . .) that *was* and about a thousand acre feet was repaid. But, then, it started to rain and to snow, and the OCAP take account of the precipitation as it builds up, and in the middle of December Bureau of Reclamation writes a letter to T-C-I-D and says stop your diversions, you're no longer entitled to divert, and they haven't been entitled to divert since. And they *won't* be entitled to divert for the rest of this year. So, in the meantime, interest is building up, (Seney: Ahh.) and now so . . . and they have other schemes to repay the water, but they haven't been accepted by the tribe, and we have a little group that meets. (Seney: What would those be?)

Issues with TCID's Water Stored in Donner Lake

Well, one, the one that's been most contentious, is that T-C-I-D has what they call privately owned water stored in Donner Lake. (Seney: But that's only 5000 acre feet.) It's only 500 acre feet, but (Seney: It's something.) it's something. But there's been a big controversy about Donner Lake, and actually it's closer to 3,500 acre feet because they share it with (Seney: Sierra Pacific.) Sierra Pacific. And there's been a big controversy that predates the recoupment case as to what T-C-I-D can and can't do with that Donner Lake water.

Seney: Well, it can't be diverted until after September 1st anyway, can it?

Pelcyger: Well, the restrictions, and *then* you have a relatively short period of time when it *has* to be released, I think from September 1st to November 1st or November 15th (Seney: Yeah. Right, right.) because of flood control considerations. But they want it to be there through Labor Day—the Donner Lake people for recreation. That's your neck of the woods. (Seney: Right. Well, sort of.) But T-C-I-D wants to be able to—first of all, they wanted to be able to take that water over to Lahontan or do with it what they wanted to.

Moving Donner Lake Water to Lahontan Reservoir Would Require a Warren Act Contract with Reclamation

Bureau of Reclamation said “No, you can't do that because first of all, if you're going to use Federal facilities for non-project water you need a Warren Act contract,” you need a contract with the Bureau of Reclamation which they never got.

Seney: This is to transport it through the Truckee Canal?

Pelcyger: Through the Truckee Canal, you know, and to store it in Lahontan Reservoir to use it through the diversion system or whatever. Once you're taking water through any Federal facility then you need a Warren Act contract if it's non-project water. And second, Bureau of Reclamation says "You're only entitled to divert water in accordance with OCAP and so if you're getting enough water from project water from the rights that the United States has from the Truckee and Carson rivers then you can't divert." And so the only time that they will allow Donner Lake water to be diverted is when there's not enough water—which is maybe one year out of ten—to meet the storage targets. So T-C-I-D hates that because this is their water, and they think they should be able (Seney: But they can't make use of it.) but they can't make use of it because of the limitations on Donner Lake storage and it's very hard for them to sell or lease it to anybody because of those limitations. It's not a steady reliable water supply. *And*, they can't take it through the canal because it's a Federal facility without a contract.

Seney: So, practically speaking, they're releasing between September 1st, let's say, whatever is after Labor Day, and November 1st, 3,500 acre feet of water (Pelcyger: Goes to Pyramid Lake.) with no credit for them.

Pelcyger: Well, they want the credit. That's . . .

Seney: That's where we're getting to here, right.

Pelcyger: So they want credit, this happened last year . . .

Seney: But they can't see the nice smile on your face as you're talking about this problem.

Pelcyger: Well, it's just an example of how it goes on and on and on and on. (Seney: Yeah. Right.) And so that's a controversy right now, and the watermaster actually gave them credit for, I think, 2,300 acre feet of Donner Lake water, and the tribe and the United States, especially the tribe, have objected to them getting credit because that's water that would have gone to (Seney: Pyramid Lake.) Pyramid Lake anyway. Yeah. Right. And they say, well, "no, we could have put it into Lake Tahoe," and we say, "Yeah, but even if it was in Lake Tahoe ~~the only time that you could~~ you have to then track it to determine what would have happened to that water if it hadn't been in Lake Tahoe, and you can't. There's no mechanism to do that." (Seney: Yeah. Yeah.) Or how much of it would evaporate when it's in Lake Tahoe. So that's an example of the kind of controversy that we're having, and you asked me about "What kind of a settlement *might* there be?" Well, one concept at least is that you don't have a number because if you have a number you're going to argue about it, and you're going to have interest and you're going to get into continuing disputes which just goes on and on and on. So maybe there is some way, for example, if you reduce the storage targets, if it's agreed upon, if you can reduce the storage targets *below* what they are in the '97 OCAP, then *maybe* you don't have to keep track any more. We know that over a certain period of time we're likely to get more water, but you don't have to monitor it. You don't have to have interest. There are some things like that

that are . . . (Seney: More elegant, kind of.) Right, and cleaner, and, you know, the one thing that T-C-I-D has always, you probably know this better than I do based on your—all the interviews you’ve had and talking to people. The one thing that they object to more than anything else is just that they are under a microscope all the time. And . . .

Seney: Right, they’re very sensitive to that, right.

Pelcyger: And they wish for the good old days when they ran the roost and nobody told them what to do. (Seney: Yes, indeed.) So an outcome in which there would be *less* intrusive regulation, and less monitoring, and less accounting, and less ongoing disputes *may* have some attraction.

Seney: Ahh. Is there any thought about monetary—any sort of money.

Pelcyger: No. (Seney: It’s just water.) Well, it’s just water, but one *possibility* which the court specifically allowed was that T-C-I-D could acquire and retire land and water rights that would (Seney: Ah. Project water rights.) project water rights. (Seney: Which would then go . . .) Right that would reduce their demand and so they . . . but not direct payments (Seney: Right.) to the tribe.

Seney: Right. Right. Very interesting. So, are you optimistic at all on this? Are you . . .

Pelcyger: I can’t be optimistic because we’ve tried so many times. And I’m optimistic that the tribe will come out of an appeal in a better position than it is now. I mean, there were those who said, including the Interior Department people who filed that lawsuit in 1995 who said it’ll be dismissed within three months, and clearly that hasn’t happened.

Seney: And the tribe traditionally has done well in front of the Ninth Circuit.

The Tribe Successfully Filed to Change the Use of Part of its Small Water Right Entitlement

Pelcyger: Yes. So that has been going on. Another thing that the tribe has done for the first time in recent years is—is you know the tribe has these water rights and claims 1 and 2 for irrigation. Not *much* water, 30,000 acre feet total. They’re using maybe 5,000 acre feet. So there’s 25,000 acre feet of basically the best right on the river that the tribe is not utilizing. Now, again, it gets pretty complicated, but for the first time, I think it was in 200 . . .

Seney: In other words, unless they take that 25,000 and apply it to agricultural use, they can’t take it.

Pelcyger: Well, yes and no. They’re not entitled to it, but they’re oftentimes now, particularly with the OCAP when that water is there, it’s in the river because T-C-I-D is not entitled to divert it and so it flows in the river, but there are times when if the tribe had that right they would be able to provide *more* water past Derby Dam, and if

they're not using it for agriculture then they could use it for instream flows. In the early, in 2001 or 2002 the tribe filed two applications to change the purpose and the place of use of those water rights to instream flows in the lower Truckee River.

Seney: Who do you file with when you do that?

Pelcyger: Well, that was an issue we had to work out way through.

Seney: Because normally it would be, would it be the state engineer?

Pelcyger: It would be the state engineer (Seney: And the Orr Ditch court?) Yes. That's what we did. We would have had to go to the Orr Ditch court anyway, and the question was whether to go to the state engineer first. (Seney: And that's a question of sovereignty, is it?) It's a question of sovereignty, but I would put it differently. It's a question of whether the state engineer has regulatory—it's state sovereignty is whether the state has regulatory jurisdiction. The tribe wasn't saying—clearly under the terms of the [Orr Ditch] decree, the court has jurisdiction over it. And the question was under the decree whether there first needed to be an application to the state engineer or whether it would go directly to the court. (Seney: Ahh.) The court would have jurisdiction, and there had been a previous skirmish about this in the 1980s, and the court basically said "Well, tribe, we recognize that your rights are different because they are federally based, but go to the state engineer anyway, and then I'll review it carefully (Seney: Yeah. Yeah.) and not give it as much weight as I would have if it were a state right.

“ . . . in 2004 . . . there was 20,000 acre feet additional that flowed to Pyramid Lake. That's 20,000 acre feet additional that in the absence of the transfer would have gone to the Newlands Project. . . . ”

But, in any event, the tribe was successful before the state engineer, *largely* successful in getting the ability to transfer that water right and in, I think, in 2004, again for the first time, 2004 being a dry year, there was 20,000 acre feet additional that flowed to Pyramid Lake. That's 20,000 acre feet additional that in the absence of the transfer would have gone to the Newlands Project.

“ . . . there are many years . . . when it wouldn't do any good to transfer those water rights because the water's there anyway. . . . the only time that it makes a difference is in a dry year when there's not enough water . . . to satisfy the full extent of the tribe's rights. At *that* point if you can have a transfer, then you can effectively require more water to pass by Derby Dam and flow to Pyramid Lake. . . . ”

Now there are many years, like this year, like 2005 and 2006, for example, when it wouldn't do any good to transfer those water rights because the water's there anyway. Because T-C-I-D's not diverting. So the water (Seney: Right.) the only time that it makes a difference is in a dry year when there's not enough water, sort of a residual flow after T-C-I-D's diversions, in the lower Truckee River to satisfy the full extent of the tribe's rights. At *that* point if you can have a transfer, then you can effectively

require more water to pass by Derby Dam and flow to Pyramid Lake. See, that was a milestone in itself.

Seney: Did the Newlands Project oppose this? (Pelcyger: Yes.) They always do.

Pelcyger: They always do. Right, and it was largely—the tribe largely won. There was one issue in which we didn't win and in which the Ninth Circuit upheld T-C-I-D's position, which was unusual. I thought of this because you said the tribe has a good track record, which it does, but the, and this is an interesting issue of water law. In rough figures the tribe has total entitlement of 30,000 acre feet of which they were using 5,000 acre feet. So we were seeking to transfer 25,000 acre feet. The state engineer granted the tribe the right to transfer about 20,000 acre feet. The difference between the 20,000 and the 25,000 is made up under the terms of the Decree is for transportation losses in conveying the water from the river to the land that were to be irrigated under the decree. And the state engineer said "Well, I'm not going to give you the transportation losses—you can't transfer the transportation losses. If you're not going to use it for irrigation then you're not entitled to use it for anything else." And the Ninth Circuit upheld that position. The tribe appealed—that is the usual rule though. What made this case kind of interesting and the reason we appealed it was because the principle that's applied when you transfer water rights is something called the "No Injury Rule," and the idea is that if you are going to use your water differently for a different purpose or at a different place than had been—than what you had originally gotten the water for or water was decreed for or appropriated for, you have to keep everybody else on the river whole. You can't do things in a way so that people have been relying on return flows or anything get less. And ordinarily that rule, the application of that rule, requires that seepage losses, transportation losses, that water seeps back to the river and then can be used further on downstream. (Seney: Right.) Well, what makes the Pyramid Lake situation unique is that there's nobody below Pyramid Lake. (Seney: Right.) So there's no (Seney: You're at the end.) we're the end, *we are* the end. So we said the application of the no injury rule here, while if you were looking at the Truckee Meadows for example, then they ~~would have to then they~~ could only divert the consumptive use. They couldn't divert the transportation loss. So they couldn't change that to municipal use, but our case is different because there's nobody that's dependent on it. Well, the court didn't agree with that, and they said the transportation loss is peculiar to the irrigation use, and if you're not using it for irrigation then . . .

Seney: You think they might have just said, "Oh, what the hell. 5,000 acre feet. This won't kill them and we can make it look like we're ruling on the part of T-C-I-D for once."

Pelcyger: I don't know. You know sometimes I think we win cases that we shouldn't win, and in some cases we lose cases we should lose. I thought we were right, but the court didn't agree.

Seney: Ahh. Very interesting. Yeah, very interesting.

Pelcyger: But we're making a lot of . . .

Seney: But that's still a great ruling. (Pelcyger: It was a great . . .) I mean it was a real victory to get that switched over.

Pelcyger: Yes, and T-C-I-D fought it hard, but after the District Court largely affirmed the state engineer and after that T-C-I-D didn't appeal the part of the case that they lost. They didn't appeal to the Ninth Circuit. (Seney: You were the one's who appealed.) We appealed, yeah.

Seney: So you were opposing, what, the state engineer in that case.

Pelcyger: And T-C-I-D because T-C-I-D got the benefit of that 5,000 acre feet.

Seney: Well, there was a time when you could have guaranteed that anything in *front* of the state engineer would not go your way, right?

Pelcyger: That's true.

Seney: So that must have been sweet, indeed.

Pelcyger: That was satisfying, yeah. And there have been one or two other things. What else.

Seney: Is this Mike Turnipseed? Or it's his successor, isn't it?

Water Quality Settlement Agreement

Pelcyger: Well, I think Turnipseed was the one who issued the favorable ruling. But, they recognized that the tribe had this prior right and they should be able to change it, and they were basically receptive to changes. We've had other experiences, which I'm about to talk about, with the state engineer that were more true to form. Let's see, another thing I don't want to forget about is the Water Quality Settlement Agreement that we entered into, and I don't think we talked about that before.

Seney: No it hadn't happened when we talked before. And that's regarded as a very important agreement isn't it.

Pelcyger: Yes. Well, the tribe back in the '80s filed lawsuits that involved the expansion of the Reno-Sparks Sewage Treatment Plant, which is now called the Truckee Meadows . . . Water Reclamation . . . Facility. Anyway, it's a sewage treatment plant, and (Seney: The other sounds better doesn't it?) TUMWRF.¹⁸ Those were the days when the Federal government were making substantial amounts of money available to cities, communities, for sewage treatment, and the Federal government Environmental Protection Agency [EPA] provided a substantial amount of money to expand the capacity of the Reno-Sparks Sewage Treatment Plant. And E-P-A made those funds available even though Fish and Wildlife Service issued a jeopardy opinion under Section 7 of the Endangered Species Act. And so the tribe sued Reno-Sparks and Washoe County and sued EPA and sued the Nevada Division of Environmental

18. Pronounced as "Tum wharf"—Truckee Meadows Water Reclamation Facility.

Protection for violating the Endangered Species Act and NEPA¹ and so forth.

Seney: The thought being that the water that flowed back in from that plant would be detrimental to the lake.

Pelcyger: Yes, right. And that they shouldn't have allowed the expansion. That was the conclusion that the Fish and Wildlife Service had reached in their biological opinion. But it was ignored. So anyway, that case was settled in 1996, and the settlement, which was *after* the Settlement Act passed, but the Settlement Act didn't address that because at the time, in 1990, we weren't, we didn't have a solution. But the solution that we came up with was that the Federal government on the one hand and the Truckee Meadows entities on the other, Reno-Sparks and Washoe County, each contributed \$12,000,000 and with that \$12,000,000 the local entities and the United States would each purchase water rights to augment the flow because the primary problem with water quality in the Truckee River is that the river is dewatered at Derby Dam so to the extent that we could buy water rights we would be able to provide water during low periods, during dry periods, and that would significantly improve water quality.

Seney: Because this water is flowing in all the time. This so-called treated water is flowing in—doesn't matter, winter, summer, . . .

Pelcyger. Well, that's true, but during dry periods . . .

Seney: That's when you *need* that extra water to dilute it . . .

Pelcyger: But a lot of that water gets diverted over to the Newlands Project, particularly during dry periods. Which means that there's virtually no flow in the lower Truckee River. (Seney: Right.) And so the idea of the Water Quality Settlement Agreement in essence was that the three local governments and the Federal government would buy these water rights and that most of these water rights would be bought in the Truckee Division of the Newlands Project. They could also be bought on the Truckee River, particularly downstream from Vista—between Vista and Derby, and if you could buy water rights and then take the land out of production and then transfer the water rights to Pyramid Lake, similar to what you did with the tribe's rights 1 and 2, claims under 1 and 2, then you could augment flows in the lower river. And that hasn't happened. In fact, the Federal government, through the B-I-A, basically turned the money over to the tribe, and it took a little while for the tribe's part of the program to get activated because we had to go through a NEPA compliance and the cities sort of got out ahead, and they bought . . . the program, we have not purchased as much water rights as we had intended, and we still have quite a bit of money that's left—in part because of the boom in Fernley and because the people in Fernley were very reluctant to sell water rights to anybody but developers because they needed to keep the water with their land. Otherwise their land wouldn't be worth anything, and Fernley has a water rights dedication ordinance that requires developers to provide water to Fernley, just like they do in the Truckee Meadows. We've acquired, I don't know, 4- or 5,000

1. National Environmental Protection Act of 1979.

acre feet of water rights, so that's been another program that's been going on since 1995, and the tribe and the Truckee Meadows entities hired a company called Great Basin Land and Water as our mutual agent, and they go out and the tribe and the local governments formed a kind of a—they meet regularly with Great Basin Land and Water to review different opportunities and to pool their resources and to . . . and that water, then, is also—storage for that water is provided under TROA²⁰ so that water can be kept upstream in storage and then released when it would do the most good for water quality once TROA goes into effect. So there is a relationship there with TROA.

Seney: Was the Great Basin Land and Water entity [the one] that employed Graham Chisholm?

Pelcyger: Yes. Well, Graham Chisholm was employed by the Nature Conservancy (Seney: To begin with.) yeah, and he was the member of the board, and they hired Aaron Peskin (phonetic), from San Francisco, and his wife Nancy Shanahan, and they've more recently hired Rob Scanlon, who was a water rights appraiser here in Nevada, and they've . . .

Seney: There was some controversy over Graham Chisholm's role in that, was there?

Pelcyger: I don't remember.

Seney: You don't recall? It seemed to me people on the Newlands Project objected (Pelcyger: Oh, yeah. Huge conflict of interest or something like that? I don't remember what that was . . .) yeah, yeah. And I don't know that much ever came of it, but . . . You didn't see it and don't see it? (Pelcyger: No.) Alright.

Illegally Irrigated Land on the Newlands Project Resulted in the Mid-1980s in a Movement to Transfer Water Rights to Make Irrigation Legal

Pelcyger: So that's another way in which the tribe and the local governments here have worked together. Another thing that we're doing, and this has been a lot of litigation. We've had lots of trips to the state engineer, and to the Federal district court, and to the Ninth Circuit, I can't remember whether we've talked about this or not, but as an outgrowth of the OCAP when the Federal government and T-C-I-D started to look carefully at the land that was being irrigated within the project, and particularly the land that was being irrigated illegally because it didn't have water rights, then there was a movement that began in the mid-1980s to transfer water rights to make these uses of land, this irrigation of land, legal. And the tribe protested those transfer applications, which went to the state engineer.

“ . . . the tribe protested on the grounds that these water rights were no longer valid because they had been forfeited or abandoned. . . . ”

And it turned out we had a number of grounds, but the ground that stuck was a claim

20. Truckee River Operating Agreement.

that because what T-C-I-D was doing was that they made a systematic search for the water rights that hadn't been used for long periods of time and tried to transfer those to these lands that were being irrigated illegally. And so the tribe protested those transfers on the grounds that these water rights were no longer valid because they had been forfeited or abandoned. And that gave rise to litigation and originally the state engineer ruled against the tribe and the Federal district court ruled against the tribe, and then the tribe won on appeal. And there was a major decision in favor of the tribe . . .

Seney: Let me see if I understand this. Say, if you had 80 acres to begin with when the project began. They'd come out and level that field and they might stick the extra sand in the middle and take up 4 acres with that or maybe on the corners so they'd only get 76 acre feet of water . . .

How the Issue Developed on the Newlands Project

Pelcyger: Well, it would be more like this, let's see, a quarter, quarter section of, you've got 40 acres, and there'd be sand dunes in the middle or maybe you'd have a gully or something run through it, or a wash or something like that that wouldn't be irrigated. And they wouldn't have water rights for that so maybe they'd get water rights for 30 acres in the 40 acres. And then over time land gets leveled and it gets improved and various other things happen and so they wind up irrigating 40 acres. (Seney: I think we're saying the same thing.) Okay, yeah. (Seney: Now where they found the water rights was under corrals and under barns and houses, and what not.) Could be shopping centers, could be highways, could be driveways, whatever, structures, (Seney: Right.) and there was a systematic effort. If they had just taken less productive land out of irrigation and moved it [water], that would have been fine, but they were looking for a way to get something for nothing. So we, the tribe, ~~claimed that those~~ challenged the transfers on the grounds that these water rights didn't exist because they'd been forfeited or abandoned. And several times were successful in the Ninth Circuit. And those cases went going on and on and on because the state engineer would rule against us and then we'd take it up to the Federal District court and he'd rule against us, and then we'd take it to the Ninth Circuit, and they ruled in favor of us, but that takes five years and then they hand it back to the state engineer to start all over again. And that process is still continuing. Oh, it's been over twenty years. And then, at one point, in late 1993 the tribe, this was all being done at . . . as a protest to transfer applications. But the tribe realized that there were other water rights out there that were not involved in any of these transfers that [had] ~~were~~ also been inactive for a long time. Because if you look at the Newlands Project, they issued something over 73,000 . . .

END SIDE 2, TAPE 1. MAY 3, 2006.
BEGIN SIDE 1, TAPE 2. MAY 3, 2006.

Seney: [This is Donald B. Seney] in Reno, Nevada, this is our third session this is our second tape. Go ahead Bob start when you want.

“ . . . the tribe realized that the total amount of water right at acreage in the

Newlands Project is 73,500 acres, but they're only irrigating, at most, 60,000 acres in any one year. More like maybe 58,000 acres. . . ."

Pelcyger: Oh, yeah, thank you. So the tribe realized that the total amount of water right at acreage in the Newlands Project is 73,500 acres, but they're only irrigating, at most, 60,000 acres in any one year. More like maybe 58,000 acres. And so there's a substantial amount of acreage that isn't being irrigated. And some of that acreage was involved in these transfer cases, but there was a lot *more* out there, and this is where the technology comes in and the satellite imagery and the aerial photographs and everything. And the other thing that happened was that the Nevada Supreme Court, these issues . . .

Seney: If I may, what you were really doing was doing an inventory of the irrigated land for the first time *ever*, really . . .

Legal Issues Regarding Forfeiture of Water Rights on the Newlands Project

Pelcyger: That's correct. (Seney: Yeah.) And the Ninth Circuit issued a ruling in our favor in 1993 ~~and at around the same time there had been~~ which made it clear that *all* of the inactive, we call these inactive water rights, they were *all* in play and that they could be lost as forfeiture and abandonment. And around the same time the Nevada Supreme Court issued a decision in an unrelated, in a non-Newlands Project case, that under Nevada law, and it was Nevada law that governs these issues, because under the Reclamation Act as you know makes state (unclear), and so the Nevada Supreme Court ruled that there's a forfeiture statute that says if the water rights are not used for five successive years then they're subject to forfeiture. But the Nevada Supreme Court ruled that if the water rights had not been used for five successive years but then, let's say, in the year six or year seven they *do* put the water to use, then the forfeiture period can be cured by putting the water to use *so long as* there hadn't been a legal challenge to the water rights at the end of the five year period. (Seney: Ahh.) So, and these cases were getting a lot of publicity in the Newlands Project, and so we realized that if we didn't challenge all these other water rights that were inactive for five years or more out there that then you would find a bunch of farmers scampering around and trying to cure. (Seney: Yeah.)

So, and this is where Stetson Engineers was extraordinarily helpful as they've been—you know, we're a team. I don't need to tell you that. And all these OCAP issues for example, they're right on top . . .

Seney: And Ali Sharoody is with Stetson.

Ali Sharoody

Pelcyger: Ali Sharoody is fantastic hydrologist, and he's just amazing. Ordinarily you find a hydrologist who specializes in one place or another, but his breadth of knowledge and experience is amazing, truly amazing. And he's very credible and he's just very straight. And he's been an enormous asset to the tribe and, I think, very well appreciated.

December of 1993 the Tribe Filed Petitions in the Orr Ditch Case and the Alpine Case Requesting the Court Declare Some 10,000 Acres of Water Rights Forfeited or Abandoned on the Newlands Project

But anyway, what we did in December of 1993 was the tribe filed what we call petitions in the Orr Ditch Case and the Alpine Case in which we, using this technology, we challenged, not in the transfer case, but we filed a petition saying that the court should declare that all of the following lands that are listed in these exhibits to the petitions that they no longer have water rights because they either forfeited or abandoned. So we did that in the Orr Ditch Case with the Truckee Division near Fernley, and we did that in the Alpine Case with the Carson Division. And so there were, I don't know, 10,000 acres of water rights that were challenged in these petitions.

Seney: You really stirred up a hornets nest with this, didn't you, in the Newlands Project?

Pelcyger: Yes.

Seney: Yeah. You're saying that very softly, but they were *really* annoyed.

Pelcyger: Yes.

Seney: Yeah.

Pelcyger: And understandably so . . .

Seney: Sure. Well it induced all kinds of uncertainty from their point of view.

Pelcyger: And their rights, which are valuable were challenged, and . . . *But*, well you know our side of the story, so what happened, to make a long story short, is that the challenges—there are a lot of issues that needed to be resolved and took a long time to resolve them in the context of the transfer cases. And so the petitions were held in abeyance while the law, the law about forfeiture and abandonment, or the courts determined what the law was, in the transfer cases. But, the petitions were there, and there was a cloud over these water rights. And the Ninth Circuit continued to issue decisions which the state engineer didn't like, and the people in the Newlands Project didn't like, and they didn't like the idea of this Federal court telling them what Nevada law was when they were quite sure it was something else than what the Ninth Circuit said it was, and the Ninth Circuit decisions were favorable to the tribe pretty consistently, especially in this case. The tribe and the United States, the government generally supported the tribe's position, but the tribe was the driving force . . .

Seney: Well, the general theory here is that the Newlands people were just using water rights they had no *right* to since they hadn't been used in a timely fashion.

Pelcyger: Right.

Seney: Do I have that right?

Marsha deBraga and Assembly Bill 380

Pelcyger: Yes. Yeah. Oh, and that as a result, that's right, because they didn't have the right because the water rights had been forfeited or abandoned. And there is a well-established law of forfeiture and abandonment *in all* the Western states, not just Nevada, that you had to use it or lose it. But it hadn't been applied very often. So, in 1999, the Newlands people—it happened at a time when there was a member of the Nevada Assembly from Fallon, from the DeBraga, she married into the DeBraga family. Her name was Marsha DeBraga, and she was the chairman of the agriculture committee that had jurisdiction over water rights. So the Fallon people came to her and said “The Ninth Circuit is doing all these terrible things, and we would like for you to support a law, introduce a law and support it and try to get it enacted that would correct the errors of the Ninth Circuit and clarify Nevada law the way we think it should be clarified.”

Fallon and Churchill County Began to Challenge Water Transfers in the Truckee Meadows

And things, it happened at a time also, one of the things that had preceded this was that the City of Fallon and Churchill County turned the tables, not on the tribe, but on the Sierra Pacific Power Company, because Sierra Pacific Power Company was filing transfer applications here in the Truckee Meadows to transfer former agricultural water rights to M&I use for the expanding urban areas. So they challenged—they filed protests to those transfers which had been going through on a routine basis for twenty or thirty years on the grounds that the water rights had been forfeited or abandoned. And they really got the attention of the developers and the Sierra Pacific Power Company because, although none of the cases actually went ~~had~~ they really put a cog in the wheels of growth and change . . .

Seney: Wasn't there a difference in the Nevada law. Was the cut off 1911 . . . (Pelcyger: '13, 1913.) 1913 water rights before 1913 were subject to forfeiture and abandonment pretty clearly if you didn't use them for the time period you outlined. (Pelcyger: Not quite.) Not quite?

Water Rights Dated Prior to 1913 Are Not Subject to Forfeiture, but Water Rights Dated after 1913 Are Subject to Forfeiture

Pelcyger: The cut off was 1913, but basically water rights that were established or initiated after 1913 were subject to forfeiture. . . (Seney: I'm sorry, it was before that they weren't.) Right. (Seney: And those would have been the Truckee River water rights.) Right, they would be just subject to abandonment, and abandonment is harder to prove than forfeiture. (Seney: Right, because it requires intent.) Intent, yeah, right. But, regardless of whether it had merit or not, there was a lot of political concern in the Truckee Meadows.

Seney: Well it did create uncertainty didn't it, and *stopped* development. (Pelcyger: Yeah.) Imperilled profits?

Assembly Bill 380

Pelcyger: And so, this was one of the better strategies that the Newlands people, Lahontan Valley people employed. So because there was an interest also, then, by the Truckee Meadows and Sierra Pacific in getting the law changed. So they went behind the tribe's back—these were our allies in (Seney: Yeah. Sierra Pacific.) Sierra Pacific, yes. And were an cahoots with the Newlands people and representatives to change the law. And so there was a hell of a donnybrook in the Nevada legislature. And the tribe hired a lobbyist, although by the time we found out about it we were kind of behind the eight ball, but Senator Reid, again, came to the tribe's rescue, and the tribe basically said "Look, if they succeed . . ." First of all, we argued that it would be unconstitutional for them to change the law retroactively to water rights that were already being challenged. You know the funny thing in the panorama of western water disputes between Indian tribes and non-Indians, the non-Indians always say you're disturbing our property rights and state law should be supreme and then the same thing happened in Arizona because when they had these adjudications and the tribes and the United States were raising questions of forfeiture and abandonment of their water rights, they raced to the legislature to get the law changed. And the Arizona Supreme Court held that it was unconstitutional for them to do that. So, anyway, I was referring to the Arizona Supreme Court, and the Arizona Supreme Court held that it was unconstitutional to apply that retroactively to revive water rights that otherwise would have been found to be forfeited or abandoned. (Unclear)

Seney: So you thought that might help you out here.

The Tribe Wanted to Control Unappropriated Water in the Truckee River to Insure it Would Flow to Pyramid Lake

Pelcyger: We did, and we argued for—but the main thing was that we went to Senator Reid, and we said to Senator Reid, "Look, if they're successful, it'll kill the settlement;" because one of the things that we were—one of the *planks* of the settlement under the provisions of the settlement was that the tribe would get the remaining unappropriated water of the Truckee River. And that we needed *more* water than that, but that one of the first things we had to do was to secure the water that was flowing into Pyramid Lake that was just left over water. We wanted to have a *right* to that water so nobody else would be able to (Seney: Unappropriated flows) appropriate it. Unappropriated flows, right. And that's something else I should get to. So as another fight that's been going on since 1995. So we said to Senator Reid, "If Nevada succeeds in changing the law and as a result of that this water that should be flowing into Pyramid Lake instead is diverted to the Newlands Project to satisfy rights that should have been forfeited or abandoned, then the settlement's over. So Senator Reid agree with us, and he rolled up his sleeves, and he went to town and the biggest political story of that year was Senator Reid's efforts, active inter . . . , and it's not very often they find a senator who rolls up his sleeve before the state legislature back home. He usually says "That's none of my business." But he felt so strongly . . .

Seney: What I have heard is that if anything he made things worse.²¹ (Pelcyger: Well . . .) And this I've heard from people who support him and are close to him. That he went in and perhaps was not so tactful.

Pelcyger: Well, there was that element to that, but in the end he succeeded. He made . . . He went in like a . . . (Seney: Bull in a china shop.) bull in a china shop. Yeah. And he particularly was crosswise with the Democratic speaker of the Assembly, and the sponsor of the, she's a very nice person, I have to be pretty close to her (Seney: And a Democrat.) and she was in a vulnerable district, and the Assembly was very close, and there was an election coming up, and so the speaker of the Assembly wanted to help her to make her seat more secure. And so he put all of his support behind her efforts which were—made her very popular with her home folks. And Senator Reid is also a Democrat, but he was crosswise with the speaker because this threatened one of the things he felt most—closest and dearest to his heart which was the settlement. And he did go in like a bull in a china shop and ~~he made and~~ there was a reaction against that—they felt stay out of here. But in the end nobody wanted to cross Senator Reid because his reputation is “Don't cross Senator Reid.” And he's a member of the Appropriations Committee and he's all the time getting Federal money and building roads (Seney: Yeah. Right.) to the local districts. (Seney: So they could huff and puff about intervention, but when push came to shove they had to go along with him.) There was pressure for them to heal this breach and to heal this wound. There was strong pressure, and eventually we were able to reach a pretty incredible compromise. It was the first and only settlement or partial settlement that the tribe and the Newlands people were able to reach.

Seney: Well, that's what I've heard that you and Lyman McConnell actually were able to sit together and, as L-B-J used to say, “reason together.” Is that true?

Pelcyger: Well, Lyman and I both participated, and the result was something that we could both sign, but I don't—it was not a situation where Lyman and I got together and worked it out. That didn't happen.

Seney: Alright. Well, you were civil to one another.

Pelcyger: We were civil to one another, and Mary Conolly from Senator Reid's office was an active participant and Marsha DeBraga wanted to try to get a settlement, and I think she realized that there were certain things that the tribe had on its side and she was just not a dyed in the wool adversary, and the speaker's office also participated. There was a lot of pressure to reach a settlement, but I got to say—so and we've been implementing that since 1999.²²

Seney: Now Marsha DeBraga, was she defeated? Or reelected?

Pelcyger: She was reelected that next year, and she since has been defeated and defeated again when she ran for her old seat, and most recently was very close.

21. See Newlands Project oral history interviews of Mary Conolly.

22. Referring to Assembly Bill 380.

Seney: Yeah. Right.

Pelcyger: But she did win that next year. Maybe one year after that, and she maintained an interest in this program, and there were times—there were subsequent disputes where she basically said the tribe was right about what the intent of the legislation was.

Seney: Well money was cobbled together, right, well, tell us what the settlement was . . .

The Settlement Reached in AB 380

Pelcyger: Well the settlement did two things or three things. ~~Money was~~ There was money that was put together into a fund and the fund would be available to buy water rights. And they could buy any water rights, but it was particularly intended to buy water rights for people whose water rights were being challenged supposedly spending money for attorney's fees that they would be able to sell their water rights to this program and that the water rights would then be retired and abandoned in formal deeds. And they'd be *paid* for it so they would be compensated for them. And Senator Reid, the Federal government was not a party to this agreement, but Senator Reid was not a party to the agreement either, but he agreed that he would use his influence and his power as a result of being on the Appropriations Committee to obtain substantial amount of Federal funding for this. And the state of Nevada contributed \$4,000,000, and also Sierra Pacific Power Company agreed to contribute out of fees that developers paid that otherwise would go to be used to go to buy water rights and the tribe had to agree to that, but that they would also contribute about two and a half million dollars [\$2,500,000]. So it was about, I don't know, 12-, 13 million dollar fund to buy these water rights and . . . (Seney: So it worked out all around, actually.) Well, it was supposed to, but that was one part of it. Also the law was changed in ways that made it . . . well, that surface water rights throughout the state of Nevada, not just the Newlands Project, were no longer subject to forfeiture, *at all*, and the law was changed in a way that would make it more difficult to establish abandonment. *But* there was a provision that said that that new law would not apply to water rights that had been challenged in legal or administrative proceedings prior to April 1, 1999.

Seney: And you had pretty much challenged all of them, (Pelcyger: Yes.) all the ones you could challenge, right. Right.

Pelcyger: Yeah, and that was partly based on the Arizona Supreme Court case which had basically said you can't apply a new law retroactively to revive a water right.

Seney: So that did turn out to be helpful?

Pelcyger: Yes. And that was an important part of . . . And also, another part of the settlement or the A-B 380 program was that—the way it worked the individuals whose water rights were challenged had-could opt in or opt out of A-B 380. There was no compulsion about it. It was totally up to them as to whether they would sell their water rights or have their water rights matched, and if they decided to litigate, you know, the tribe would litigate. But it was really up to the individuals, and nobody could compel them

to do it, and the state engineer made known and wrote letters and told them that they had the right to participate, and if they opted in he wouldn't rule on their cases even if ~~it had even if~~ they'd already had a hearing on them. But, another provision was that **if** the holders of the water rights chose to litigate, and if they **lost**, then the tribe would be compensated for water rights that were found to be forfeited or abandoned as a result of the litigation. (Seney: Ahh.)

“ . . . we set an objective of forfeiting or abandoning 6,500 acres, again, not acre feet, 6,500 acres of water rights. . . . ”

And then the last important aspect of the A-B 380 legislation or agreement was that we set an objective of forfeiting or abandoning 6,500 acres, again, not acre feet, 6,500 **acres** of water rights. And that was a compromise figure. And the tribe agreed . . .

Seney: 6,500 acres of water rights versus acre feet. I mean 6,500 water-righted acres. (Pelcyger: Right. And each acre has three or four [acre feet of water right].) Right, I see what you're saying. OK. (Unclear.)

Pelcyger: But it's closer to 20,000 acre feet. (Seney: I see. OK.) That's why you always have to be careful about it. (Seney: Right. Right.) So, that reminds me, I gotta write a note. (Brief pause in the conversation) So this goal was set, or objective was set of abandoning 6,500 acres of water-righted lands—of water rights for water-righted land, 6,500 acres of them, and if that goal was met, then the tribe agreed to withdraw its challenges to anything over and above that. And the program was supposed to last five years, and its been extended, and actually it's supposed to expire now the end of June. And it hasn't been as successful as had been anticipated. It now seems certain that the 6,500 acre goal will **not** be met.

Seney: How much have you gotten?

Pelcyger: Well, last I heard it was maybe 4,200 or 4,500 acres or something like that. There has been, or at least there have been reports of a last minute **rush**, but they don't think they're going to be able to reach 6,500—which then places the issue back in the tribe's court about what the tribe's going to do with the remaining challenges.

Seney: Do you know yet?

Pelcyger: That's going to be up to the Tribal Council to decide. But it's coming up because the program ends at the end of June.

Seney: What are you going to recommend?

Pelcyger: I'm gonna just give them the facts (Seney: Yeah.) and let them know the

Seney: Oh, you're smiling like—I wish the microphone could pick up these smiles. Well, I have to ask, but you don't have to answer, and you're not gonna, so . . . no, that's fine. I understand you don't want to prejudge what your actions might be.

Pelcyger: Well, actually, there was the time when the A-B 380 program basically wrote a letter to the tribe and asked the tribe what was the tribe going to do if they didn't reach 6,500 acres, because, I think, they wanted to use the tribe's response as the way to gin up more interest in the program. [If] the tribe said that we were going to sue then they would . . .

Seney: Oh, I see, but you didn't respond?

Pelcyger: Well the tribal council said that's a decision that a future tribal council is going to have to make. (Seney: Ahh. Interesting, interesting.) So that's taken up a lot of effort, both in litigation and in implementing the A-B 380 program and Stetson Engineers again has to review the proposed purchases and find out whether the water rights are challenged or unchallenged, and so that's an on-going work. But the *result is* to reduce the—that no more water rights are being issued on the project, and so it's in the tribe's interest to reduce the total amount of water righted acreage in the future—even if the—because there's going to be so much demand for that water. We now know that even if it's not to irrigation, it'll be for wetlands, or it'll be for Fernley, (Seney:" Development.) or development, or Fallon, or whatever, and so the more acres there are to be satisfied, the more acres of water rights, the greater the burden on the Truckee River. So it's in the tribe's interest to reduce that.

Seney: One of the complaints that the people in Fallon have had is that their water is not worth nearly an acre foot what water is worth in the Truckee Meadows. And that has to do with the fact that the Bureau of Reclamation has put limits on where that water can be used. (Pelcyger: No.) No?

Issues That Affect the Value of Water in Fallon as Opposed to Upstream on the Truckee River

Pelcyger: I mean, I don't know what they're saying. They may say that, but it's not true. (Seney: Ahh.) You know, what is that [saying] in real estate. "It's location, location, location," right? It's the same thing with water rights. ~~That the reason~~ There are different markets, and, like I was just saying to you before, Newlands Project water rights are not available for use for development in the Truckee Meadows because they're not a reliable water supply because, as I was saying, (Seney: Ahh. Ahh.) because in order to have a water right that is acceptable to be the basis for development, whether it's a subdivision or whatever it is in the Truckee Meadows, for homes, it has to be a year in and year out dependable supply. (Seney: It has to be an earlier priority than the Newlands Project.) It's not only a question of priorities, see the Truckee River is the supplemental source for the Newlands Project. (Seney: Ahh, sure, I see.) And there are years like this year when the Newlands Project is not entitled to any Truckee River Water. (Seney: Aha.) And so if you're not entitled to divert the water you can't—when you transfer it to another use it's only—it has the same quality as it had before and your only [use] would be, if you could do such a thing, you'd only be entitled to it in the years or during the times which is sporadic so it's not a dependable water supply. (Seney: I see. I see. OK.) But, on the other hand, the value of water rights in Fernley has just skyrocketed in a very short period of time because Fernley has demand for the water and that remains to be seen and

there are a lot of issues associated with it, but at least it was *thought* that Newlands Project water rights, the Truckee Division in Fernley, because that *is* (Seney: A dependable source.) a dependable source because that is a year in and year out and a supplemental source to the Carson River, which is what the people in Fallon have. (Seney: Ahh, OK.) So it's a question of supply and demand and for a long time they complained because the only, or the major, potential purchaser of the water was the Federal government for the wetlands. (Seney: Yeah. Right.) And it was sort of a monopoly situation and a lot of them rebelled against selling their water rights to the government or wished there was more competition which of course would drive the price up. And maybe there is now, by developers. I don't know. (Seney: Right. Right. OK, thank you. Thank you.) A lot of complaints, but their reasoning . . .

Seney: Well, but you know everybody, as we were talking before at dinner. (Pelcyger: Right.) People have a viewpoint and perspective, and it may or may not be accurate, but then that has nothing to do with how deeply held it is.

The Issue of Unappropriated Water

Pelcyger: Exactly, right. Another issue that we've been working on hard since 1995 has to do with this unappropriated water issue which is a condition pressed into the Settlement. One of the provisions of the Settlement Act is that before TROA can take effect and the interstate allocation provisions, the, I think the way the Settlement Act refers to it is that the tribe's claim to the remaining waters of the Truckee River that are *not* subject to valid water rights must be resolved in a way that's mutually agreeable to the tribe and the state of Nevada. And that again is to establish this baseline to effectively close the Truckee River to any further appropriations so that the water that's currently flowing to Pyramid Lake will continue to flow and then we could build on top of that through all these different mechanisms—the OCAP, the abandonment and forfeiture, the acquisitions of other water rights, and all these different things. So in 1993, shortly after the Settlement Act was passed, the tribe and the state of Nevada, and, actually, the Secretary of the Interior, signed, Bruce Babbitt—there was a ceremony, I think at the last minute he decided he was going to sign the agreement, but it was negotiated between the tribe and the state. We decided how we would go about implementing this provision, and the tribe had had applications filed in 1984 to appropriate unappropriated water from the Truckee River for the purpose of instream flows and also to maintain the level of Pyramid Lake, they were two different applications, with the state engineer. Which is a very unusual thing for a tribe to do. And, to make a long story short, again (Seney: Not too short.) Not too short? (Seney: That's correct.) The tribe agreed with the state that the tribe's claims to the unappropriated water would be resolved first and foremost through these applications before the state engineer. Which was a major concession on the tribe's part. (Seney: Right. Let me turn this over.)

END SIDE 1, TAPE 2. MAY 3, 2006.

BEGIN SIDE 2, TAPE 2. MAY 3, 2006.

The reason that was a major concession is because of this issue of sovereignty, and, of course, Federal reserve rights, there was an alternative way for the tribe's rights to

be secured which would have been under Federal law, which would have been a more traditional way from the tribe's standpoint, to do it. But the state was adamantly opposed and so we entered into this compromise, but the tribe insisted, though, that once these water rights were, *if* they were approved by the state engineer, the applications, then the tribe and the state would together ask for the Orr Ditch Decree to be amended to recognize these rights so that it would have—they would be confirmed by a Federal court and they wouldn't be subject willy nilly to be .(Seney: Later on to some future state engineer.) right, exactly. And that if Orr Ditch Court would declare that the waters of the Truckee River were fully appropriated, and so that the state engineer couldn't then, even if he wanted to issue water rights to anybody else. So, we proceeded to do that, and in due course the tribe's applications came on to be heard and they were opposed and protested by the usual suspects (Seney: You mean T-C-I-D, of course.) yes.

Seney: Even though I understand the Federal government always said you can't have these because we won't let you transport them through the Truckee Canal.

Unappropriated Water Agreement of 1984

Pelcyger: Well, that's right. What happened was that T-C-I-D had forgotten about this, but it turned out, and we didn't know about this, but when the state engineer went back over his records to hold a hearing on the tribe's applications, and there were some other applications that were out there as well, he discovered that T-C-I-D had filed an application in 1930 for 100,000 acre feet of additional water from the Truckee River—over and above the water right that the United States had for the project. That these would be state water rights not in the name of the United States for the project but in the name of T-C-I-D, and those applications had never been acted upon. So T-C-I-D—then the hearing was expanded not just to include the tribe's applications, but the other applications—there were also applications filed by Sierra Pacific and Washoe County as well as Reno and Sparks. So the tribe and Sierra Pacific and Washoe County and Reno and Sparks entered into an agreement that would resolve all our differences called the Unappropriated Water Agreement of 1984. But in order for it to be effective, it had to be approved by the state engineer.

So the state engineer held a hearing on the tribe's applications and on these competing applications, including T-C-I-D's application, and you're right the Bureau of Reclamation opposed T-C-I-D's application and said, again, just as they had with regard to the Donner water that "Even if you have the right to this water, we won't let you use our facilities because it would be *contrary* to the Truckee Carson-Pyramid Lake Water Rights Settlement Act (Seney: Right.) to allow these additional diversions." So, then in 1998, the state engineer and state sat on these applications for a long time which was a source of concern to the tribe.

Seney: Why did they do that, do you think?

Pelcyger: For leverage (Seney: Over?) over the tribe. (Seney: For?) Well, for whatever, for issues that came up during TROA or something. Once they granted the application, then they would lose whatever . . .

- Seney: Well, there were negotiations at some point going on that Pete Morros²³ was involved in (Pelcyger: Yes. Yes.) would this have something to do with that?
- Pelcyger: Yeah. Well, he was involved in TROA very heavily, and there were users from time to time that, for example, Pete Morros was interested during this period in the tribe and T-C-I-D. He (Seney: He tried to broker something, didn't he?) He tried to broker something, and the rule was that lawyers couldn't attend, the negotiations . . .
- Seney: Probably a good rule, quite appropriate.
- Pelcyger: That's ~~been~~ happened more than once over the years. But they never reached any agreement. But, in any event, he eventually issued decisions in which he (Seney: He, the state engineer.) the state engineer which was Morros at the time, I believe. No it wasn't, it was he was gone. (Seney: Morros was director . . .) The director, yeah, but it was (Seney: Under him.) under him, right.
- Seney: So these were kind of in abeyance to, for Morros's purposes, to keep pressure on you, you think.
- Pelcyger: Yeah. Yeah. And he more or less admitted that. So Turnipseed issued a decision in 1998. First issued a decision denying T-C-I-D's application for the 100,000 acre feet. Skipping one procedural step that didn't matter, and granting the tribe's application **but refusing** to agree to this Unappropriated Water Agreement which put a severe strain on the partnership between the tribe and the Truckee Meadows entities. There was a lot of debate by Reno, Sparks, Washoe County, and Sierra Pacific about whether they should appeal the state engineer's decision because under our agreement the tribe would have eventually gotten the unappropriated water, but only once TROA went into effect. And, so that they would basically, TROA would still be, we would still have a major incentive, and so they were concerned that if the tribe got the right to unappropriated water why maybe we would leave TROA. And it was, I think, a calculated effort on the part of the state to maybe drive a wedge between the tribe and the Truckee Meadows entities. (Seney: Yeah. Yeah.) Senator Reid again became involved and urged all the parties to stick by the terms of the agreement even if they weren't required to and even if it wasn't binding and to try to ~~make~~ find some other way for Humpty Dumpty to ~~come back to~~ be glued back together again. So they ultimately decided not to appeal and to support the tribe's position which they've done. Of course T-C-I-D appealed both cases and those cases are still pending. A long history. One of the cases went up to the Nevada Supreme Court on the question of a challenge to one of the judges so that took two or three years to litigate, because the tribe had challenged a local judge from Churchill County under Nevada law and the judge had overruled the tribe's challenge and we got it reversed by the Nevada Supreme Court and those kinds of things. So, those cases are still out there. We just finished briefing one of them, and ~~we're~~ the resolution of those cases is a condition precedent to TROA taking effect because of that provision of the Settlement Act that said it has to be resolved. Well, if the appeals are still pending, and that's one of the things that T-C-I-D is trying to do to prevent TROA from taking

23. Peter (Pete) Morros participated in Reclamation's oral history work on the Newlands Project.

effect is to prolong those appeals and continue to fight that.

The Alpine Decree Has Not Been Enforced on the Upper Carson River, and That Is Taking Water That Should Be Going into Lahontan Reservoir for the Newlands Project

So that's the sampling of--there've been other things the tribe's been involved in that are not directly related to the settlement but have other water matters. But that's another area that we're looking at but haven't done anything about is the last frontier of water disputes in this area is the upper Carson [River] which we talked a little bit about at dinner. (Seney: Right. Right.) And the upper Carson's really gotten a free ride all these years because they haven't, even though there's a decree, it hasn't been enforced. The Alpine Decree has not been enforced in the upper Carson, and the result has been that there's a lot more water being diverted and depleted from the upper Carson (Seney: Ahh.) before it gets to Lahontan Reservoir. (Seney: Which was segment 1. Is that segment 1?) Well, there are segments 1, 2, 3, 4, 5, 6, and 7 are above Lahontan Reservoir. (Seney: Ahh.) And there are a lot of complications, but, in essence, the United States and T-C-I-D historically have water rights on the Carson River that vis' à vis the upper Carson they've never enforced. And the reason was because the Truckee River always made up any deficiencies in the Carson. (Seney: Right. Right.)

“ . . . for the first time I think the Churchill County and even T-C-I-D are looking carefully at what's going on in the upper Carson, recognizing that various proposals that have been made that would involve the transfer of agricultural water rights or groundwater rights to M&I use would come at their expense. . . . ”

But increasingly attention is being focused on the upper Carson and part of the reason for that is because the upper Carson is now--there's been a lot of development (Seney: Exactly right. Right. There's clearly a lot competition there.) and for the first time I think the Churchill County and even T-C-I-D are looking carefully at what's going on in the upper Carson, recognizing that various proposals that have been made that would involve the transfer of agricultural water rights or groundwater rights to M&I use would come at their expense. (Seney: Right. Right.) And the Truckee River may not be there for them (Seney: Yeah. Yeah.) to make up the difference. So that's another area, as I say, one of the last frontiers, and that could, again it's all about closing the Truckee Canal. And, obviously the more water that comes down the Carson into Lahontan Reservoir, the closer we are (Seney: Right. Right.) to realizing that goal. (Seney: So that has to be one of your objectives is to try to *increase* the flows out of the Carson into Lahontan.) Yes.

Seney: Alright. Bob, why don't we leave it there.

Pelcyger: Yeah.

END SIDE 2, TAPE 2. MAY 3, 2006.
BEGIN SIDE 1, TAPE 1. AUGUST 9, 2006.

Dealing with the Issue of TCID Opposition to TROA

Seney: [This is Donald B. Seney in] Reno, Nevada, today is August 9th, 2006, this our fourth session and our first tape, and I did say the date, good to see you, as always, Bob. And why don't we talk about one of the clouds hovering over the TROA has been the Truckee Carson Irrigation District. *Everybody* knows, I mean they've made it clear, from the beginning that they're going to challenge this in the courts. And I know *one* of the bases that they're going to try to use is that they were signatories of the *original* Truckee River agreement, and they're *not* going to be signatories to this one. How have you during the negotiations, because I assume you have, thought about this and tried to do things that would head them off?

"We did try to bring them into TROA, and that never really got to first base. . . . But they were never interested and . . . made proposals about different kinds of issues . . . but none of them were serious. . . ."

Pelcyger: Well, we have anticipated their opposition. We did try to bring them into TROA, and that never got, really, to first base. But we sent emissaries, and some care was taken so that I would not be an emissary. The tribe wouldn't be an emissary. But they were never interested and never—from time to time they made proposals about different kinds of issues, I can recall at least one of them, but none of them were serious.

Seney: Russ Armstrong attended for a while didn't he.

A TCID Proposal about Water Quality at Derby Dam Didn't Address the Biggest Issues of Water Quality below Derby Dam

Pelcyger: Yes, Russ Armstrong attended frequently and the proposal I'm thinking of, Russ Armstrong made. It was—maybe to take brief diversion, there were issues about water quality in the Truckee River, and T-C-I-D made a proposal that would have basically offered to utilize water that would be destined to be diverted at Derby Dam and to change the timing of that which is one of the things that TROA does through operation of the reservoirs in a way that would be more favorable to water quality as an alternative to some other things that we were thinking about. And he was quite—he pressed that on several occasions. Of course, the problem with it was that it dealt with water quality at the Derby Dam, and it didn't, and, of course, the biggest problems certainly for the tribe and for the river as a whole, from a water quality standpoint, are below Derby. So that didn't really address the issue.

The Tribe and State of Nevada Tried to Insure That Changes to Operation of Lahontan Reservoir Would Not Interfere with the Rights of TCID

But, one of the overarching issues in TROA, generic issues which applied to T-C-I-D, but not just to T-C-I-D, was this question of how are you going to change the operations of the reservoir but in a way that didn't interfere with other people's rights. And I would say that that was always Nevada's principal interest? How were we going to do that? And we spent hours—because you touch something here and it

has effects elsewhere, but we took that very seriously, and, in fact, then the tribe did so actually it was the tribe and I and Ali, and we took that very seriously, and there were some times when the tribe and Nevada took that issue most seriously. From the tribe's stand point it was contrary to our self interest, in fact, sometimes I remember the Federal representatives made proposals that the tribe opposed. (Tape interrupted.)

Seney: Go ahead.

To Avoid Challenges Later, There Were Many Water Rights Besides TCID's That Nevada and the Tribe Sought to Protect

Pelcyger: Anyway, I was just recounting and recalling that there were times when members of the Federal team made proposals about the Newlands Project which we thought went too far, and there was a strange alliance between the tribe and Nevada because we both took seriously. We didn't want to go out on a limb for some possible benefit but that would run a risk that TROA wouldn't be ever put into effect because we went too far in terms of not protecting Newlands rights. And it was not just Newlands rights. And it came up in a variety of ways because every time, as I said, every time we wanted to do an exchange between reservoirs and the system is so complex that you really don't know what the effects are going to be. (Seney: Right.) So all kinds of safeguards were put into various provisions to make sure that—and TROA itself has a very important provision that gives the right to non-TROA parties to utilize—they have rights that are decreed under the Orr Ditch Decree and they're not a party to TROA, they have the right to go to the Orr Ditch Court and to go to the watermaster²⁴ to have their dispute resolved. And so, it's just a principle that is in the statute and in the Settlement Act as well as in TROA that *nothing* will be done that will infringe on people's water rights, and so we really feel like we went the extra mile to protect that.

“ . . . they [TCID] don't see it that way . . . they've maintained from the beginning that since they were a party to the original Truckee River agreement that if the Truckee River agreement is going to be modified they have to be a party to it and that others can't do it without their consent. . . . ”

But, of course they don't see it that way, and they are—they've maintained from the beginning that since they were a party to the original Truckee River agreement that if the Truckee River agreement is going to be modified they have to be a party to it and that others can't do it without their consent.

“ . . . we've looked into that issue *thoroughly* and we believe that there are circumstances under which courts can modify consent decrees without the approval or consent of all the parties to the original decree. . . . ”

And we've looked into that issue *thoroughly* and we believe that there are circumstances under which courts can modify consent decrees without the approval

24. Garry Stone, the Federal watermaster, in 1994 participated in Reclamation's oral history program on the Newlands Project. In addition to responsibilities implementing the Alpine Decree on the Carson River and the Orr Ditch Decree on the Truckee River, in both California and Nevada, the watermaster is now (2013) involved in implementation of the new TROA (Truckee River Operating Agreement).

or consent of all the parties to the original decree.

“ . . . we need to also show that those parties’ interests are being protected. *Not* that they have veto power over everything, but that what we’re doing will not impair the rights that they have . . . ”

Then you need to have a showing, and you need to be able to justify it, and you need to show that it’s in the public interest, which we think we can do, and we need to also show that those parties’ interests are being protected. *Not* that they have veto power over everything, but that what we’re doing will not impair the rights that they have under this agreement.

Seney: How are you doing that with the Truckee River agreement? How are you folding in whatever advantages there were for T-C-I-D into the TROA.

How Floristan Rates Might Be Managed to Insure TCID Rights Are Unimpaired While Enhancing Flows to Pyramid Lake

Pelcyger: Well, for example, in the biggest issue—well, basically what we’re doing is that we are making sure that to the extent, you know, that the Truckee River Agreement requires certain flows at Floristan. (Seney: Right.) And to the extent that the flows are required under the Truckee River [Agreement] result in flows at Derby Dam that T-C-I-D is entitled to divert, then we’re not doing anything to interfere with that. But to the extent, for example, that there are—this is a very good example, very important to the tribe—to the extent that there, under the Floristan Rates, for example, that there are flows that require, let’s say in November/December/January when the temperatures are low and during the natural hydrologic cycle there wouldn’t be much water in the river, and, of course that’s the natural hydrologic cycle is ~~what the fish have evolved with~~ the ecosystem that they [the fish] evolved in. But under the Floristan Rates, which were intended originally to produce power on an all year round basis, there’s *more* water flowing in the river at certain times of the year like the fall and the winter than there would have been naturally. So, as I said, to the extent that the Floristan Rates provide water that T-C-I-D under the OCAP are entitled to divert, we don’t mess with those, but to the extent that the Floristan Rates provide water that would flow to Pyramid Lake—that their only use was to generate hydroelectric power and then they flow all the way to Pyramid Lake—to the extent that we can hold some of that water back and re-time it so that it would more closely resemble the natural hydrologic (Seney: Ahh.) cycle so that it’d be available in the spring, say, or the summer and better for the fish, then we can do that. So that’s an example.

Debate over M&I Use of Former Irrigation Water in the Truckee Meadows Area

Now, one thing that T-C-I-D complains about is that under TROA TUMWA [Truckee Meadows Water Authority], for example, TUMWA has acquired a lot of former irrigation rights here in the Truckee Meadows. And in a normal water year they have more rights than they actually have need for. And so right now, without TROA, let’s say Sierra Pacific, just for the sake of argument, has rights to 100,000

acre feet. But in a normal water year they don't use all of that. They only use 80,000 acre feet. So TROA gives them the right with this 20,000 acre feet of *former* irrigation rights ~~to say~~ right now that water flows on down—sometimes it's diverted by T-C-I-D. Sometimes not. Sometimes it goes to Pyramid Lake. But TROA gives them the right to *store* just the consumptive use portion of those rights. As opposed to the return flow element. So, let's just say the right is three acre feet per acre, and one acre foot per acre is return flow. So there's two acre feet per acre is the consumptive use. So TUMWA has the ability to be able to store that two acre feet, that otherwise would have been diverted for agriculture originally, in upstream reservoirs—water that's now either flowing down the river and being diverted by T-C-I-D or going to Pyramid Lake. And that water gets stored as drought supply which they can carry over in the reservoirs, which is very important to them.

Well, T-C-I-D says, "Well, by storing that water you're interfering with our rights to the extent that we'd be able to divert the water." And, of course, you have to remember that at the time of the Truckee River Agreement they were diverting everything. (Seney: Right.) Now, under OCAP they're very limited in what (Seney: Right.) they can divert. (Seney: Right.) So it's really OCAP that has made the difference which they don't like and have tried to get overturned—but not successfully. Well our response to that is "Yes, there may be some circumstances under which that water would otherwise be available to you, but that doesn't impair your rights because your rights were subject to the use of that water for irrigation, and," it was a senior right, "and so if it was diverted for irrigation then that two acre feet per acre would have been consumed by the crop and never would have made it downstream. So, by putting that water up in storage, that doesn't deprive you of any . . . you might have gotten, been able to use that as a windfall but not as a matter of your right, and by taking that and transferring it upstream and holding it over that doesn't impair or interfere with your water right. And the state of Nevada agreed with that because it was a (Seney: Right.) senior water right and because ~~it acted because~~ at one time those water rights were used for irrigation (Seney: In the Truckee Meadows.) in the Truckee Meadows and the water would have been consumed in the Truckee Meadows and not made its way down to the Newlands Project. So that's the kind of—for example, we were careful that they couldn't store the return flows, because if the water right was, my simplified example, for three acre feet, and ~~one acre foot would have been diverted and used by~~, I'm sorry, two acre feet would have been diverted and used by the crop and one acre [foot] ~~feet~~ would have returned to the river. We made sure that that one acre foot stays in the river.

Seney: Right. Right. Well, Nevada was T-C-I-D's friend and benefactor, right, looking out for their interests. So if you got their agreement to this they must have talked to T-C-I-D about it, do you think?

The State of Nevada's Involvement with TROA, TCID and the Truckee Meadows

Pelcyger: Well, I think they talked to them about it, but T-C-I-D obviously didn't get—I mean the state did not get the T-C-I-D to agree, and I don't know what all the conversations have been. I think there probably have been efforts to educate T-C-I-D or at least for Nevada to explain why they feel that, Nevada and others, to explain why they feel

that T-C-I-D's rights are *not* being impaired in the legal sense and they're not being legally injured. I should mention he's supposed to call me back so (Seney: That's alright.) we may be interrupted again. But T-C-I-D hasn't bought it, and T-C-I-D is opposed to it, and Nevada, it's an interesting situation with Nevada—I don't remember what we said in previous interviews, but you're right that historically Nevada has supported not only the Newlands Project interests but its own interests in Lahontan Reservoir and more recently—Lahontan Reservoir is a state park and the state has a *big* interest in recreation and makes money off of the recreation at Lahontan and they want to make sure that Lahontan is kept at certain levels for their boat ramps, and they always say, I don't know, Labor Day that the second biggest population in the state is at Lahontan. I don't know if that's true. It may not be true any more, but and they also, more recently, they have a major interest in the wetlands, and they've spent a lot of money to buy water rights for the wetlands. So on the one hand ~~they~~ not only do they certainly historically had an alliance with T-C-I-D, but they also have their own state interests which coincide with T-C-I-D interests. But, on the other hand, they've got the Truckee Meadows interests which are very much in favor of TROA and very much in favor of being able to establish a drought water supply.

“ . . . overriding, probably everything else, you have the state's interest in the California-Nevada allocation . . . ”

And then overriding, probably everything else, you have the state's interest in the California-Nevada allocation (Seney: Right, right.) which is a successor to the compact that they tried to negotiate. And they did actually reach an agreement in 1970 and '71 with California that was then never ratified by Congress, and the tribe successfully opposed.

“ . . . my feeling is that if it weren't for the compact the state of Nevada would never have signed on to TROA. . . . ”

But I would think my, you know, my feeling is that if it weren't for the compact the state of Nevada would never have signed on to TROA.

Seney: In other words, for the interstate allocation that was in the compact?

Pelcyger: Yes, the interstate allocation.

Seney: The ninety-ten . . .

“ . . . Nevada has always felt . . . sooner or later California was going to get all this water that was going to Nevada . . . and so an interstate allocation is very important to Nevada. . . . ”

Pelcyger: Yeah, that's one way to describe it. But Nevada has always felt, you know, that sooner or later California was going to get all this water that was going to Nevada—whether it was going to be a tunnel up to Lake Tahoe or something, but they've always had a dreaded fear that California, because of its size and power, that it was going to take all that water and so an interstate allocation is very important to

Nevada. And, of course, it involves the waters of Lake Tahoe, the Truckee River, and the Carson River. (Seney: Right.) And the old compact also used to include the Walker River, but we left that out of the . . .

Seney: Yeah. Yeah. So they're both between a rock and a hard place with T-C-I-D on the one hand and interstate allocation on the other . . .

Pelcyger: And their own interests (Seney: Right, right.) and with the Truckee Meadows interests, and Pete Morros's testified in the recoupment case on behalf of the state of Nevada, and we objected to his testimony, but he was the Nevada representative in the negotiations on the Settlement Act. And he made it clear in this testimony, which maybe you want to try to get your hands on, he was very unhappy about the results and especially unhappy about Senator Reid and Senator Bradley and how they, in fact, there was one time, I don't know—it's been a while since we've talked and I can't remember what was in the testimony. But I remember at one point Pete Morros was furious about the direction (Seney: We didn't talk about this.) the Settlement Act was taking at one point, and he called a meeting of quote the Nevada interests [unquote], which, of course, were all the interests except the tribe. (Laughter.) And all the interests in Nevada, and he had this group put together a Nevada draft of the Settlement Act which Senator Reid and Senator Bradley just rejected out of hand.

“ . . . Nevada was . . . very reluctant to be a partner in the Settlement Agreement, and if it weren't for the compact they never would have been . . . ”

And he was very unhappy about that, and this all came out in the—and Nevada was pulled, dragging and by its feet and very reluctant to be a partner in the Settlement Agreement, and if it weren't for the compact they never would have been (Seney: Unclear.) and for the allocation. (Seney: Ohh.) *That* was the

Seney: That was the real carrot for Nevada, then. (Pelcyger: Nevada carrot.) Yeah. Well I know how anxious the business interests were here in the Truckee Meadows about (Pelcyger: Yeah.) that 90-10 and *remain* (Pelcyger: Yes.) interested, obviously, in that.

Pelcyger: Yeah, but much less intensely now than they were before they'd sort of taken it for granted and they sort of faded from the political picture. They were a very big part of it originally, yes.

Seney: Well, this certainly puts Nevada in an interesting spot doesn't it? In terms of *pushing* T-C-I-D interests when it comes to any suit against the TROA and which side they come down on.

“ . . . they *have* to come down on the side of TROA. . . . they are a required signatory to TROA. And they can't do anything other than defend it. . . . ”

Pelcyger: Oh, they'll come down on—they *have* to come down on the side of TROA. And they've made that . . . (Seney: Yeah.) and they wouldn't—they are a required signatory to TROA. And they can't do anything *other* than defend it. So *if* they sign TROA,

which I expect, don't see any reason why they won't do, they *will* have made that choice. (Seney: Right. Right.) And they participated in it for whatever it's been, fifteen-, sixteen years.

Seney: Do you, you know I know others that this would certainly be, I think, the tribe and yourself and California perhaps, and the Feds too, have kind of gotten *tired* of T-C-I-D over the years pretty much objecting to everything and never coming to the table with anything really causative. Has the state of Nevada, from your observations, gotten a little *weary* of the role the T-C-I-D has assigned to itself do you think?

Pelcyger: I don't know weary—the state has, on numerous occasions tried to bring T-C-I-D and Pete Morros, again, held all kinds of meetings, and I wasn't allowed, lawyers weren't allowed to be there, and he tried to convince T-C-I-D and the tribe to enter into a peace treaty. I think that they're frustrated.

Seney Well, these were the negotiations, the two party negotiations after the Settlement II negotiations collapsed weren't they?

Pelcyger: Yes. Yes. (Seney: Yeah.) But there have been various efforts throughout over time to bring T-C-I-D in. They've never worked, and I suspect that, nobody's ever told me this in so many words, but I suspect that there's frustration and—frustration's probably the best word. Disappointment. (Seney: Right.) But the state engineer has made decisions in contested proceedings that have favored the tribe over T-C-I-D. Particularly where any matters ~~where~~ that had a direct effect on TROA. And therefore on the interstate allocation. (Seney: Right.) But he's also, in our view, been a real—for example in the, I think we talked about the forfeiture and abandonment litigation on those matters he has ruled consistently in favor of Newlands Project water right owners and T-C-I-D and been reversed repeatedly by the Ninth Circuit, and every time it comes back he finds a different reason to rule in their favor, and we've been back six or seven times and it's still going on over more than twenty years now. So, he has been on both sides.

Seney: You know when we spoke on the phone you mentioned the context I had brought up the new Churchill County executive, and you mentioned that there was actually a couple of issues on the upper Carson where you and the T-C-I-D found yourselves on the same side.

There Are Issues on the Upper Carson River Where the Tribe and Churchill County Are on the Same Side

Pelcyger: Well, I don't know about T-C-I-D, but that's true of Churchill County. (Seney: I'm sorry, yeah.) And, in fact since we met last, within the last two weeks the tribe and Churchill County have both protested on similar grounds, with some collaboration between us, transfer applications in the upper Carson [River].

Seney: Tell me a little about those applications. You kind of *smiled* when you said that. What are you thinking. What's on your mind. (Pelcyger: Well . . .) You know we've talked a few times so I know you well now. I want to know more.

The Groundwater Situation in Lyon County

Pelcyger: Well the upper Carson is a new frontier and I smiled because recently, and you could probably get hold of this, through Churchill County, the hydrologist for Churchill County provided Don Springmeyer and me a Powerpoint presentation that the state engineer made almost exactly a year ago. And it was a Powerpoint presentation about the status and the horrible mess in Lyon County, in particular, created by much much greater amounts of groundwater pumping than recharge. And this Powerpoint presentation includes Fernley and the areas south of Fernley which are in the Carson River watershed. And it was an incredible thing because the state engineer, and this was at a presentation that was made in Dayton in Lyon County, and it was all very well documented in terms of basin by basin and sub-basin by sub-basin. How much water rights, first of all, had been approved. How much water rights had been permitted, and how much had been certificated. And including all of the priorities—these were all groundwater rights, now—and how much they all added up to in these sub-basins and then that was compared with the estimate that the U-S Geological Survey had made of the perennial yield of the aquifer.

“ . . . in every instance the amount of these rights that were granted and the amount of actual pumping—they were pumping less than the total amount of the water rights—but the pumping *enormously* exceeded the perennial yield . . . ”

And in *every* instance the amount of these rights that were granted and the amount of actual pumping—they were pumping less than the total amount of the water rights—but the pumping *enormously* exceeded the perennial yield and so in this presentation the state engineer basically said “We’ve got a huge problem here. What are we going to do about it.” And one thing he indicated could be done would be to—the state engineer under Nevada law has enormous authority to administer these groundwater basins in order to limit pumping to a sustainable long term amount.

“ . . . all of that groundwater pumping means that that affects the surface flows in the Carson River which reduces the Carson River flows to Lahontan Reservoir which requires more diversion from the Truckee River. And on this the tribe and Churchill County are in agreement . . . Churchill County is asserting its interest in the rights of the lower Carson, that is the Newlands Project, being the *senior* rights for storage in Lahontan Reservoir . . . ”

And clearly somebody had screwed up somewhere along the line because—and, of course, from our standpoint all of that groundwater pumping means that that affects the surface flows in the Carson River which reduces the Carson River flows to Lahontan Reservoir which requires more diversion from the Truckee River. And on this the tribe and Churchill County are in agreement, and, for the first time, Churchill County is asserting its interest in the rights of the lower Carson, that is the Newlands Project, being the *senior* rights for storage in Lahontan Reservoir and other rights that they have under the Alpine Decree being enforced vis’ à vis the upper Carson water users. And that’s especially sensitive now because the upper Carson is being rapidly transformed from agriculture to urban (Seney: Right.) development. (Seney: Right.)

“ . . . these applications that were filed that we both protested were to change agricultural rights to municipal uses . . . ”

And so there is intense pressure for development, and these applications that were filed that we both protested were to change agricultural rights to municipal uses and the tribe and Churchill County are saying “Whoaaa, we’ve got some big, big problems with everything that’s gone on—that’s happened in the upper Carson, including this tremendous over-pumping of groundwater. And before you grant any applications you better get ahold of this situation.

“ . . . if they limited the amount of groundwater pumping by priorities so that they went back and only allowed the amount of water rights by priority that was consistent with the perennial yield of the basin you’d be cutting off 75-, 80 percent of the pumping . . . ”

The state engineer as part of this presentation went through different, as illustrations, went through different groundwater basins about how many, if they limited the amount of groundwater pumping by priorities so that they went back and only allowed the amount of water rights by priority that was consistent with the perennial yield of the basin you’d be cutting off 75-, 80 percent of the pumping—not even the total amount of the rights, which is even greater. So it’s the next frontier.

Seney: What do you do about something like that?

Pelcyger: I don’t know. I mean, what he said was the possibility of enforcing priorities which he clearly has the authority to do. And you scratch your head and wonder how could they allow such a thing.

Seney: Yeah. Am I right in thinking tha . . .

END SIDE 1, TAPE 1. AUGUST 9, 2006.
BEGIN SIDE 2, TAPE 1. AUGUST 9, 2006.

I was going to say, am I right in thinking that if you draft this aquifer you don’t reach (unclear) but the aquifer sort of loses its ability, collapses, loses . . .

“ . . . the principal concern that we have is that the ground and surface waters are hydrologically connected, and as the groundwater is pumped out then water that would otherwise flow down to Lahontan Reservoir instead recharges the groundwater. . . . ”

Pelcyger: Yeah. That is possible, subsidence, and I don’t know the extent to which that’s happening, but as I say, the principal concern that we have is that the ground and surface waters are hydrologically connected, and as the groundwater is pumped out then water that would otherwise flow down to Lahontan Reservoir instead recharges the groundwater.

“ . . . the state engineer takes the position that under Nevada law regardless of

the physical interconnection between the ground and surface waters, which everybody scientifically recognizes as a fact . . . it doesn't matter because under Nevada law they're administered as two separate systems—groundwater and surface water. And so when we grant groundwater rights we don't pay any attention to the surface water. . . .”

The state engineer, this is another interesting story, the state engineer takes the position that under Nevada law regardless of the physical interconnection between the ground and surface waters, which everybody scientifically recognizes as a fact, the state engineer says it doesn't matter because under Nevada law they're administered as two separate systems—groundwater and surface water. And so when we grant groundwater rights we don't pay any attention to the surface water. They said that specifically in an opinion dealing with Pyramid Lake Tribe, but having to do with the water in Dodge Flats with that Duke Energy Project when that was going on out there.

“ . . . they totally ignore a decision by the state engineer, Roland Westergard actually in a case called *Griffin against Westergard* on the Walker River he denied groundwater applications on the grounds that they would interfere with senior surface rights on the Walker River, and that case went to the Nevada Supreme Court and he was upheld. And it's as clear as day and the Nevada state engineer just completely ignores that decision of the state's highest court. . . .”

But they totally ignore a decision by the state engineer, Roland Westergard²⁵ actually in a case called *Griffin against Westergard* on the Walker River he denied groundwater applications on the grounds that they would interfere with senior surface rights on the Walker River, and that case went to the Nevada Supreme Court and he was upheld. And it's as clear as day and the Nevada state engineer just completely ignores that decision of the state's highest court. So it's going to be interesting.

Seney: We have such development pressures on that upper Carson (Pelcyger: Yes, tremendous.) so much money involved. (Pelcyger: Yep.) And you're still smiling. I don't know, there's something in the back of your mind you're not telling me, and I want to know what it is. (Laughter.) (Pelcyger: No, I . . .) You see something here that makes you smile, and does this in a way pit these people against the Newlands Project?

The Interested Federal Bureaus Are in Agreement on Carson River Issues

Pelcyger: Absolutely. Well, and now I don't know if T-C-I-D has protested these applications, but Churchill County has. And the interesting thing, also, is that it's not often that you find that *all* of the Federal agencies are on one side of a water dispute. But if you look at the interests—what's the interests of the Bureau of Reclamation? The interest of the Bureau of Reclamation is the Newlands Project, and the rights that the United States has to the waters of the upper Carson. With a senior priority call, this groundwater pumping what's the—and then the U-S Fish and Wildlife Service has

25. Roland Westergard has contributed to Reclamation's oral history work on the Newlands Project.

acquired all these rights in the Newlands Project for the wetlands, and they're looking at the upper Carson in the same way. And then you have the portion of the U-S Fish and Wildlife Service that's concerned about Pyramid Lake's threatened and endangered species, and they know that the less water that flows into Lahontan Reservoir from the upper Carson, the more water gets diverted from the Truckee River so *they're* on the same side. So you have—and then you have B-L-M and they're interested, at least some of them are interested, in restoration of Lahontan Cutthroat Trout in the Carson River—we still look at Carson River will be a true river, and the ecology of the Carson River can be restored. And then you got the Pyramid Lake [Paiute] Tribe and all of those interests converge which is a very rare thing when you have all of these—and the Bureau of Indian Affairs, of course, as well.

Seney: Well, what is that likely to lead to?

“ . . . I think it's going to lead to major changes in the upper Carson . . . ”

Pelcyger: Well, I think it's going to lead to major changes in the upper Carson, and I think the state engineer—I was amazed when I saw this Powerpoint presentation because it was all laid out, and he gave his presentation in Dayton to Lyon County.

Seney: This is where the culprits are.

“ . . . what's happened over the last twenty or thirty years, forty years, is you have intense scrutiny and intense regulation and conservation at Lake Tahoe and the Truckee Meadows. On the Newlands Project, the lower Carson, everyplace except the upper Carson. The upper Carson has been spared of any scrutiny. . . ”

Pelcyger: Yeah. Exactly, and he went into the lion's den. But I think that's the next frontier in this—and the very strange thing about it is that it's such an *odd* situation, an odd circumstance, because you look at what's happened over the last twenty or thirty years, forty years, is you have intense scrutiny and intense regulation and conservation at Lake Tahoe and the Truckee Meadows. On the Newlands Project, the lower Carson, everyplace *except* the upper Carson. The upper Carson has been spared of any scrutiny.

Seney: That's true.

“ . . . the state engineer's been certifying the availability of water for all this development in the upper Carson knowing that it's not sustainable. Knowing that there is far far more water being pumped than is recharged on a long term basis. . . ”

Pelcyger: And there's an awful lot of water up there, and you take a look, I don't have it with me, you should take a look at that report, and the numbers are staggering in terms of how much groundwater is being pumped. And *now* what they want to do, of course, is to convert all of the groundwater rights that were originally granted to agriculture to municipal use. And the other . . . (Seney: Some of those are not being used now,

are they?) You know, I don't know that. I'm sure—it is clear that not all of the groundwater rights are being utilized (Seney: The agriculture ones.) and part of them also, some of those rights which presents interesting issues, are called supplemental rights. That is that the irrigators rely on the surface waters until they run out, and then they pump groundwater for the rest of the year. They're not all-year-round rights. Then superimposed on all this is that you have the state engineer under Nevada law is responsible not just for granting the water rights, but when there's subdivision development the state engineer as well as the local government has to certify to the availability of water so the state engineer's been certifying the availability of water for all this development in the upper Carson knowing that it's not sustainable. Knowing that there is far far more water being *pumped* than is recharged on a long term basis.

Seney: How do you explain that?

Pelcyger: I don't explain it. I can't.

Seney: I've maybe I mentioned this in the last time we talked, but, no, I don't know that I did. I understand there's some suspicion that's been relayed to me by what I consider to be a good source of some chicanery, malfeasance, from the Fernley area. That there may be some question of questionable dealings and so forth. Do you have a suspicion that this might be going on in terms of what you've been discussing?

Groundwater Issues in the Fernley Area

Pelcyger: Well, I know what the state engineer's report says about Fernley. In terms of—because that's in Lyon County, too (Seney: Right.) although it's not on the upper Carson—it's not in the Carson. (Seney: Right.) But what the state engineer said about the Fernley groundwater basin is that the state engineer has granted rights for something like 12,000 acre feet of water to be pumped from the groundwater basin, and the estimate of perennial yield is 600 acre feet. Now there's little asterisks next to 600 acre feet which says not including seepage from the Truckee Canal. (Seney: Canal, right. Which is, what, maybe 30,000 acre feet.) Well, I've heard that number. I think the total seepage is more like, I think, 20,000 acre feet, but not all of that is in the Fernley basin. And the amount that actually recharges the Fernley basin is—I don't know that that has been quantified. But that's not a sustainable source. There's no right to that water for (Seney: Right. Exactly.) that purpose. It's not naturally recharged.

Seney: Well, for the last two years there hasn't been any water diverted from the Truckee into the Lahontan, has there?

Pelcyger: Not to Lahontan. But to . . .

Seney: But for the Truckee Division there has.

Pelcyger: Yes. Right.

Seney: But that only gets it so far down the canal, doesn't it.

Effects of Reductions in Diversions from the Truckee River on the Fernley Area

Pelcyger: Yeah. I mean there's a certain—there was a terminal flow that does take some water into—that's allowed. It takes some water from the Truckee Canal into Lahontan even when they're not entitled to divert. But not very much compared to what they historically . . . And that's part of the whole issue with Fernley is that forty years ago, say from say 1915 to 1967, the Truckee Canal was full all the time. *All* the time. I mean, Lahontan Reservoir could have been filling and Lahontan Reservoir was still diverting Truckee River water to Lahontan Reservoir. But then, with the advent of the OCAP and the gradual ratcheting down of the OCAP the average annual Truckee River, I don't know if I've mentioned this to you, diversions to the Newlands Project, including both the Truckee Division and Lahontan Reservoir have been reduced from 240,000 acre feet a year *average* to 60,000 acre feet. (Seney: Right, right.) So naturally much much less seepage than there was forty years ago.

Seney: Does this have—the lower reaches of the Truckee Canal just must have some impact on what you were discussing in Lyon County in terms of the recharge of that groundwater. Some of that must have come from the Truckee Canal which . . . You were talking about the state engineer's Powerpoint. (Pelcyger: Yes.) You were saying look how much can be taken, is taken, look how little is coming back in. And I should think that *some of that* little that's coming back in is coming out of the Truckee Canal—or was.

Pelcyger: Well, in the Fernley area, but the other groundwater basins in Lyon County (Seney: That's not so.) no doesn't come from the Truckee Canal just because of hydrologic boundaries.

Seney: I guess the Truckee Canal is, what, in Churchill County at that point.

Pelcyger: Yeah, right. And Hazen and the Churchill County. (Seney: Right. Okay.) But the portion of it that's in Lyon County doesn't—the rest of Lyon County isn't in the watershed of the Carson River and so this doesn't affect that.

Seney: You know, this is on the upper Carson, you know, could be troublesome.

Pelcyger: Troublesome to whom?

Seney: Well, I think maybe to TROA, even. I mean, don't you want to get TROA signed off before you stir up too much of a hornets nest on the upper Carson?

The Tribe Ignored the Upper Carson River Issues for about Ten Years, but Now Several Factors Are Requiring the Tribe to Take Action

Pelcyger: Yes, but, and this issue has been known by the tribe for ten years, and for ten years the tribe has been—we stirred up a little hornets nest ten years ago about this and I wrote some letters, and they stirred up a *big* hornets nest. And for various reasons the

tribe laid low. I think some of the political issues you indicate, but (Seney: Right. Right.) now we don't—now the issue has come to the forefront because of all the development that's occurring and because of these transfer applications, and the state engineer and his Powerpoint presentation. And he sees these issues so if you don't do something now with these transfer applications—if you just let them go then it's too late so at this point you (Seney: You have to do something.) you have to do something. You can't just sit back and wait, and I think Churchill County feels that way too.

There Have Been Changes over Time in State Personnel Dealing with Water Issues on the Truckee and Carson Rivers

Seney: Why, if that state engineer, and, of course, we're talking about the office of the state engineer, there've been several occupants of it, that you mentioned Roland Westergard, Pete Morros was also state engineer (Pelcyger: Right. Mike Turnipseed.) and Mike Turnipseed who became director of conservation, (Pelcyger: They all do.) yeah, that's the progression, and the current director was the state engineer (Pelcyger: No.) no?

Allan Biaggi

Pelcyger: The current director is the first one, Allan Biaggi, who was not. He came out of Division of Environmental Protection, which is very unusual. (Seney: Ahh. Right.) In fact, I think he's unique—and then there was Hugh Ritchie (phonetic) who recently resigned in June and Tracy Taylor (phonetic) took his place who came up through the ranks.

Seney: And he had been state engineer.

Pelcyger: Well, he's now the state engineer. (Seney: He's now . . .) He took Hugh Ritchie's place. Hugh Ritchie was not the director of conservation.

Seney: He was the state engineer.

Pelcyger: Right.

Seney: Yeah. Why would the state engineer at this point, you know, put on this Powerpoint presentation? (Pelcyger: Better ask him.) Maybe I will. What do *you* think? You're smiling again . . . (Laughter)

Pelcyger: No, I don't know. I need to put a face on . . .

Seney: Yeah. You need a mask. We need a partition here.

Pelcyger: I don't know. I think—I'd be interested in the answer to that. I think that they recognize that it was not just a mess, not just a problem, but a gigantic one and that it was irresponsible to continue to (Seney: Sweep it under the rug.) sweep it under the rug and to avoid it. And especially with all the development that was going on.

- There was one thing—it's a relatively manageable problem if you have—you can buy up agricultural water rights and that's extensive, but when you start converting it to houses, which has been going on at a great pace, at that point you're talking not millions, but billions, and people being dependent on a non-existent water supply.
- Seney: You know I went, as you know, to interview the new Churchill County executive, and this was a couple months ago, month and a half ago, and I have not been out that way for, maybe, three years. And I can't believe the amount of (Pelcyger: In Fallon, huh?) no, no, in Dayton. (Pelcyger: Dayton, yeah.) You know, out highway 50 from Carson City out you know until you get to Hazen and what not. I mean, the amount of development is just staggering, and, of course, knowing what little *I* do, what was in my mind is where the hell's the water coming from.
- Pelcyger: Yeah. Well, they're trying to build, you know, to use the Truckee Meadows model and to convert agriculture to municipal. That's going to present a lot of problems.
- Seney: Are they doing what Truckee Meadows did, what Reno-Sparks did and Washoe County, and that is require the developers to bring water rights with them?
- Pelcyger: I believe so.
- Seney: Yeah. I'm not as familiar with it. I think that's what they are doing.
- Pelcyger: And that's why you get these transfer applications. I think that's what they're doing. I think that they require them to be turned over to the local rather than to the water purveyors.
- Seney: I understand that the last time that there was a auction of water rights in Washoe County the price was \$40,000 an acre foot.
- Pelcyger: Yeah. I think there was a price as high as \$70,000 an acre foot, and prices in Fernley have skyrocketed.
- Seney: Well, I was going to ask you. Do you know what it is in Fernley, what it is in the Dayton area, now?
- Pelcyger: Well, in Fernley I think it's around \$20,000 an acre foot, and a couple of years ago it was about a \$1,000 an acre [foot]. I don't know for the Dayton area.
- Seney: It's got to have shot up (Pelcyger: Yes.)—no question about it. Well this is a very interesting kettle of fish because obviously you're going to have tremendous interests arrayed against, I guess against T-C-I-D, or would people, with plenty of money to buy water rights, but that's a problem too, isn't it, buying water rights from the farmers?
- Pelcyger: And transferring them upstream, is that what you're saying?
- Seney: Yeah.

Pelcyger: Yeah, that's not easy.

Seney: Because you couldn't really buy them and divert them above Lahontan [Reservoir] because the water rights only exist once they get in Lahontan. Right?

Pelcyger: Yeah. I don't think that—as far as I know, there have not been any of those transactions. Just, I think that the focal point has been on—and the upper Carson is complicated because of the segmentation issue that they have. It's much more complicated than the Truckee to administer so even acquiring water rights and transferring them from segment to segment, to say nothing of the problems with Lahontan, are problematic. So I don't think there's been any effort to acquire—where upper Carson developers have acquired water rights from Newlands Project farmers.

Seney: I would think, given the restrictions of the Alpine Decree, the segmented that you point out, and this whole question of the farmers don't have the water until it's in Lahontan would mean absolutely you'd have to pump it back up to them. If we could figure out a way I could buy it from you, and I want to divert it in Dayton, somebody downstream would say "Wait, wait. I've got a prior right to you. Even a prior right to the water right you've bought. You've got to let that water come to me first, if there's not enough in the river to meet my rights." You're nodding in agreement.

Pelcyger: Yeah.

Seney: Yeah. I just don't know why you're smiling so much.

Pelcyger: I really don't know either.

Seney: I just feel like there's something else here that (Pelcyger: No there's nothing else.) that you've let part of the cat out of the bag but I can't see the tail yet.

Pelcyger: Well, I can't see the tail either. But it's—part of the reason I'm smiling is just because it's something new, (Seney: Yeah.) and been at this for forty years and so I see something new that is a challenge and a major challenge and (Seney: Right.) and you're sort of—I'm grappling with it now (Seney: Right.) trying to understand it and see what's happening.

Seney: Well, I think the only way to stop that development along that highway 50 corridor is through water rights. Through putting an end to the water rights. I mean, I don't know how else you would do that. You know Los Angeles used to control some very serious—might not issue sewer permits, and that was a very simple, straightforward, direct way of you can't hook up. You can't build without a hook up, and all that. So I suppose that's the only way you curtail it, but there's *so much money* pushing against any will to curtail it, and, of course, that's what happened in L-A too. You just forestall it and forestall it until it's *so valuable* that they'll pay *any* price to hook up to the sewers. Any price to get the politicians elected who will let them do it. (Pelcyger: That's right.) That's right. That's exactly what's happening. That's right. Well, that's very interesting that this alliance between the tribe and Churchill County.

Pelcyger: It's in its infancy, but it's definitely a recognized common interest—not on all things, of course.

Seney: Right. I understand. Anything else that you seem to see eye to eye on? Or looks like you will, maybe that's developing? (Tape paused.) I was just asking you about were there other things that maybe you were going to be cooperating with Churchill County on.

Pelcyger: Well, I think right now the upper Carson, but not just the groundwater issues in the upper Carson, but the whole issue of all the entire problem of how much water from the upper Carson is now getting to Lahontan Reservoir versus how much should be, and what are the various rights of the lower Carson interests *vis à vis* the upper Carson to curtail some of the water use that's going on in the upper Carson. I think that's the—there could be some other areas of common interest. When we were together we talked about a lot of things. They were interested in the A-B 380 program, and they were interested in—they did ask some question about TROA—so once you, you know, begin to establish some trust and recognize that, I think (unclear—Fred Goetz?) recognizes that the tribe's not out to get Churchill County and that there are areas of common interest, and, where there are, we should at least try to have a dialogue and work together. And once that kind of relationship starts, you never know where it's going to (Seney: Exactly.) where it's going to end up.

Seney: You've never had these kind of discussions with T-C-I-D, have you?

The Only Discussions of the Tribe with TCID That Led to an Agreement Were on AB 380

Pelcyger: Never is a strong word. We have had some constructive negotiations with T-C-I-D with one exception they never led to any agreements. And they always were frustrating because we felt like . . .

Seney: And the exception was?

AB 380 Implementation Was Going Well until Churchill County Representatives Were Placed on the Carson Subconservancy Board

Pelcyger: The exception was A-B 380. When they were one of the parties that was involved in that. And that didn't turn out at all well from the tribe's standpoint.

“ . . . the tribe wasn't treated fairly by the lower Carson interests. . . . essentially the program got taken over by Churchill County because they had the most interest in it and the other board members tended to defer to them . . . ”

I mean in terms of how that—we did have an agreement, but it's been—the tribe wasn't treated fairly by the lower Carson interests.

Seney: My understanding is it was going pretty well. The Tahoe, or, I'm sorry, the Carson

Subconservancy²⁶ was sort of seen as a neutral party (Pelcyger: Originally.) originally and allowed to administer it, but then in the midst of all of this there was a change in the law that allowed it to expand and include part of Churchill County. Then you had, what, two people appointed from Churchill County . . .

Pelcyger: I don't know the numbers, but yeah, essentially the program got taken over by Churchill County because they had the most interest in it and the other board members tended to defer to them, you know, just the way they wanted to be deferred to, and that sort of—so that they each developed their own little piece of the agency's business, and so they had the power, and they treated the tribe, I think, very poorly. And . . .

Seney: They put up a lot of roadblocks in a way to more purchases, and the purchases were going along pretty well, 3,000 acre feet or so, maybe, had been bought, maybe 3,500 when this change occurred.

Pelcyger: No. No, 3,500 is what they have now. But there wasn't any one change. It did evolve. The tribe was always outvoted or outgunned or the decisions were made, practically from the beginning of the program, but to an ever increasing extent that the tribe didn't feel that fairly carried out the intent and put the tribe at a disadvantage.

Seney: This must have required the approval of the legislature, this change in the . . .

Pelcyger: Yeah, and you know I didn't even know that it was happening. I mean it was . . .

Seney: It got in under your radar?

“ . . . it accomplished some good things. . . . people who had water rights that were challenged—it gave them the opportunity of selling those rights rather than risking them in litigation and paying a lot of money to lawyers to have them litigated. And from the tribe's standpoint it reduced the amount of water rights that are available for use on the project, and so that was important. . . . ”

Pelcyger: Well, the tribe's never had much of a radar at the state legislature which is a problem. (Seney: Yeah.) Hopefully that's going to be corrected, but I'm not even sure we would have recognized the impact that it would have had, but, in any event, the tribe for all of its—or all of the unfairness and the unfair treatment, the program has not turned out poorly from the tribe's standpoint. That's what we were at the hearing about today and about part of what's going to happen now with that program. So it was, and it accomplished some good things. It allowed people who had water rights that were challenged—it gave them the opportunity of selling those rights rather than risking them in litigation and paying a lot of money to lawyers to have them litigated. (Seney: Right.) And from the tribe's standpoint it reduced the amount of water rights that are available for use on the project, and so that was important. And the tribe was

26. Carson Water Subconservancy District.

able to obtain a significant amount of money from the program as well because of water rights that it was successful in litigating and for other things.

“ . . . it left a very bad taste in the tribe’s mouth . . . but the Lahontan Valley interests had the power and they asserted that power and now they are at the point where they need some cooperation from the tribe, and, guess what, they’re not getting it. . . .”

So, but it left a very bad taste in the tribe’s mouth and the subconservancy district, for example, made a series of decisions that were contrary to the views of both Mary Conelly from Senator Reid’s office and Marsha deBraga who was the principal legislative sponsor of the legislation and that Mary and Marsha felt were not fair to the tribe and that were contrary to the, if not the letter, at least the spirit of the legislation, but the Lahontan Valley interests had the power and they asserted that power, and now they are at the point where they need some cooperation from the tribe, and, guess what, they’re not getting it.

Seney: Yeah. Do you think, or do you know, that if this change in the make-up of the Carson subconservancy was purposely done by the Churchill County interests in order to thwart.

Pelcyger: I don’t know. I hadn’t made that association before. But I’m less conspiratorial than you are. (Seney: Just suggesting possibilities here.) You could very well be right, but I don’t know.

Seney: Yeah. It’s hard sometimes to think there isn’t a motive when you see the outcome, you know. It’s not hard to infer one from the outcome.

Pelcyger: But it’s taught me a lesson anyway and I think the tribe a lesson—I think if it had been a positive experience and if it had been—if there was a sense of fairness about it if there was a sense of trying to carry out the agreement, even if it meant things like listening to Marsh deBraga who, after all is from Fallon and represented Fallon, and Mary Conelly, who I think is an honest broker, then that could have augured well for future agreements, but this experience is not something the tribe is going to want to repeat.

Seney: Well, the whole genesis of A-B 380 really comes from Churchill County and T-C-I-D playing the game pretty well, (Pelcyger: Yeah.) filing (Pelcyger: Protests in Truckee Meadows.) in Washoe County and Truckee Meadows and precipitating the need for some kind of legislation. I mean, I think, people admire them for that—“My God, they’re playing the game here the way it should be played.”

Pelcyger: Yeah, and they were very clever because what they did was they created a rift between the tribe and Sierra Pacific and through Sierra Pacific the Truckee Meadows interests because by protesting the transfer applications at that time by Sierra Pacific, now TUMWA, and on forfeiture grounds and stealing our thunder and following our model, then they created—that wound up creating an alliance on this legislation, and by the . . .

END SIDE 2, TAPE 1. AUGUST 9, 2006.
 BEGIN SIDE 1, TAPE 2. AUGUST 9, 2006.

Seney: This is Donald Seney with Robert Pelcyger in Reno, Nevada, today is August 9th, 2006, this our fourth session and our second tape. Go ahead, Bob.

“ . . . the Fallon interests did do a smart thing and they opposed the transfer applications from the Truckee Meadows on grounds of forfeiture and abandonment and borrowed a page from our book and as a result of that they created a lot of pressure in the Truckee Meadows to figure out some way to avoid these forfeiture and abandonment issues, and that led them into a politically convenient partnership with Churchill County at that time, which was in 1999 . . . ”

Pelcyger: I think I was saying that the Fallon interests did do a smart thing and they opposed the transfer applications from the Truckee Meadows on grounds of forfeiture and abandonment and borrowed a page from our book, and as a result of that they created a lot of pressure in the Truckee Meadows to figure out some way to avoid these forfeiture and abandonment issues, and that led them into a political[ly] convenient partnership with Churchill County at that time, which was in 1999, and it happened that Marsha deBraga was the chairperson of the Assembly committee that dealt with water rights, and so she got together with Sierra Pacific and they came up with draft legislation that would have been very bad from the tribe's standpoint. I think we told this story didn't we (Seney: I think we did. Some details.) yeah, and that turned into be *big* issue before the legislature, and ultimately in a compromise Senator Reid intervened and very forcefully and forcibly and created a *big* stir. (Seney: Right. Right.) but it turned out to be a reasonable compromise, the legislation, and then, as I indicated, and that really was quite a riff between the tribe and Sierra Pacific. As I said, it was during the infancy of the relationship that we had, and they cast us overboard at the first opportunity.

Seney: That surprise you?

Pelcyger: Yeah. (Seney: Did it? Yeah.) Because it seemed to me that the leadership of Sierra Pacific recognized they had crossed the Rubicon, and they had recognized that the future lay in some kind of a relationship with the tribe, and after all the Settlement Act had not been implemented. And, you know, the reason that Senator Reid got so involved was because the tribe said that this legislation, if it passed, would conflict with the Settlement Act and that the tribe would no longer be a partner in TROA because it would have violated one of the conditions of the Settlement Act which was that the tribe's right to the remaining waters of the Truckee River would be protected. And if the legislature intervened in a way that would enable more water to be diverted from the Truckee River, which was the whole goal of the legislation, by allowing water rights that had been either found to be forfeited or abandoned or would have been found to be forfeited or abandoned, to be revived then it would undermine the legislation. And the whole purpose of the legislation on the part of Churchill County was to undo court decisions that the tribe had won in the Ninth Circuit. And which some in Nevada were furious about because they felt that the Ninth Circuit had no business making water law for the state (Seney: Right.) state

water law.

Seney: But you were able to checkmate that in a sense and get them to undertake this purchase program which actually was of advantage to everyone, right . . .

Pelcyger: And which got quite a bit of money and also the bill was amended so that the changes in the law were only prospective and didn't apply to water rights that had previously been challenged by the tribe. (Seney: Right.) Otherwise we would have been faced with litigation and claimed that the retroactive application of these laws making it more difficult for water rights to be forfeited or abandoned was unconstitutional—which had been done in Arizona. So it would have been a big mess.

Seney: Right. Right. I suppose the pity is, from your point of view, that T-C-I-D didn't act a little more magnanimously in carrying *out* the legislation.

Pelcyger: Not just T-C-I-D, but Churchill County and the city of Fallon . . . yes. (Seney: Yeah.) I thought it was an opportunity that was lost that could have been the beginning of an improved relationship, but . . .

Seney One of *many* lost opportunities, I guess, huh. (Pelcyger: Yeah.) Why don't we, if you've finished on this, why don't we shift to the TROA and talk about the "fork in the road," which everyone says you're the one that has to tell me about this.

Rod Hall, the Truckee River Model, and TROA

Pelcyger: Well, I'll pass it on to Ali Shahroody. (Seney: Poor Ali.) You don't say poor Bob. I don't know . . . (laughter.) He's a more sympathetic . . . Well my memory is a little bit hazy, but what I recall is that—I can't remember exactly when it occurred. Ali has a better time sense than I do. I want to say late 1990s, but we were going down the road, the TROA road, and one of the main tools that everybody used in relying on TROA was a model which was sort of started in the early days of modeling and then Rod Hall (phonetic) was sort of the pilot of the Truckee River model, and he was employed by Sierra Pacific, and Rod was a very good guy and a very straight guy, but nevertheless he was a consultant for Sierra Pacific and the model was—he was only one who really at that time knew how to operate the model and made various changes to it, and it was sort of patchwork, and it was undocumented, and there were some—he was just the master of that ship.

“ . . . one day we discovered that the model was operating in such a way that we felt was contrary to our understanding of how some of the reservoirs should be operated. And it was operating . . . in a way that was beneficial to Sierra Pacific and detrimental to the tribe which fundamentally affected the whole way the TROA could operate. . . . ”

And then one day we discovered that the model was operating in such a way that we felt was contrary to our understanding of how some of the reservoirs should be operated. And it was operating at—it was being done in a way that was beneficial to Sierra Pacific and detrimental to the tribe which fundamentally affected the whole

way the TROA could operate. And it enabled TUMWA to be able to create credit water out of water that would *otherwise* have been fish water or Stampede Project water. And we felt that that was nothing that we had ever agreed to, and that the model was doing things in a way that was not what we at least had ever—had never been talked about and had never been agreed to and had been assumed, I guess, by Sierra Pacific, and maybe that’s the kindest word. So that led to a whole reevaluation which went on for at least the better part of a year or a year and a half or something like that.

Seney: Let me stop you to ask you about something in this context. There was a time at the beginning of the TROA negotiations when Sierra Pacific had volunteered to sort of take minutes and to keep track of what had gone on in the meetings, and it developed subsequently that the minutes as they reflected them were not necessarily what other people had remembered happening. Do you recall that.

Issues with Sierra Pacific Developing TROA Drafts

Pelcyger: Well, I wouldn’t say it was minutes. I think they sort of were the keepers of the TROA drafts (Seney: I guess that was it. Yeah.) and they, at the end of meetings or something, they would take it upon themselves, or we probably all acquiesced that they would reflect the outcome of the meeting in subsequent drafts, and problems developed because there was a feeling that they weren’t always honest brokers and that they were bending things toward their interests.

Seney: So Bill Bettenberg took it over.

Bill Bettenberg Took over Development of TROA Drafts

Pelcyger: Yes. Yes.

Seney: Did this recollection come to mind as you looked at the model and . . .

“ . . . this was much more than a matter that there was a dispute about what was discussed at a meeting or how we intended to do something. . . . the tribe and Sierra Pacific, anyway, and I think the Federal government as well were just operating on different wave lengths. . . . ”

Pelcyger: No, not really. I think this was something that—this was not simply just a—this was much more than a matter that there was a dispute about what was discussed at a meeting or how we intended to do something. This was a fundamental—we were just, the tribe and Sierra Pacific, anyway, and I think the Federal government as well were just operating on different wave lengths. We didn’t have any idea that the model which we were all relying on was doing things, and . . .

Seney: So this was just an honest difference of views.

Pelcyger: Yeah. I think it was an honest difference of opinion.

Seney: So you raised this at a meeting, right. (Pelcyger: Yeah.) You brought this up (Pelcyger: Right.) and what happened.

**“It was an honest difference of opinion. But, it took a while to get back on track.
...”**

Pelcyger: Well, there was a lot of gnashing of teeth, and, you know it’s funny, memories about it—some things are very clear. This one isn’t. (Seney: Yeah. Always makes me suspicious.) No, I’m not consciously hiding anything. (Seney: You can tell me the figures from the Powerpoint presentation.) That was last week. (Laughter) But there was a lot of, you know, the model had to be redone, and it took a lot of time and programming, and (Seney: Did Ali get involved?) Ali got involved, yes, he worked closely with Rod. And we all had respect for Rod. (Seney: Yeah, I’m aware of that, yeah.) Not many people could have pulled off what Rod did because he had to have everybody’s respect and confidence in order to be able to get as far as we did. And I don’t think anybody blamed him personally. It was an honest difference of opinion. But, it took a while to get back on track.

Seney: Well, it took more than months, didn’t it?

Pelcyger: Yes. I was going to say at least a year or maybe a (Seney: Right.) little more.

Seney: Right. Yeah. And during that time, then, the model was sorted out and . . .

Pelcyger: Yeah, and there were different, right. And I think we went back over the language of the agreement and—to make sure that we were saying what we meant and questions about did it really make a difference in the end, I mean it made a difference. There were different kinds of operations that would or would not occur. But in terms of what some of those things would have a tendency to cancel each other out over a longer term. But ultimately we found solutions.

Seney: Was it a better agreement do you think?

Pelcyger: I think so. Yeah. I think so.

Seney: Did you feel a little heat for raising this stuff? May I say, it wouldn’t surprise you to know that you have a reputation for being very thorough and for seeing a lot of things that others don’t necessarily—see, I’m trying to phrase this in, because I mean it in a nice way—that is you, and I don’t mean to nitpicking because that’s not what I mean, but you were obviously a zealous advocate for your client, friends, and other people recognize that, but sometimes it also may lead to some gnashing of teeth as you put it, when you raised this. Did you feel like that even once it was resolved that the gnashing the teeth was over with and if so that was good and we should have done that.

“... it wasn’t an attempt on anybody’s part to deceive, and I think everybody recognized that it was legitimate issue to be raised and considered and ultimately resolved. . . .”

Pelcyger: Yeah. I don't think there was a residue of hard feelings about it. I mean, I think that there was a recognition on all our parts that we—as I say, we were just on different wave lengths. And it wasn't an attempt on anybody's part to deceive, and I think everybody recognized that it was legitimate issue to be raised and considered and ultimately resolved.

Seney: Well, I haven't been told anything else. I mean, no one has said to me "That God damned Pelcyger. The tribe, God damn those guys." They're just, "Oh, we had to go over all this stuff and make sure everybody was happy." You know.

Pelcyger: Yeah, and it was a difficult process. But I think . . .

Seney: Well, I made the point to you in another context that, you know, if everyone is ably, vigorously represented, you may get these kind of delays, but in the end you get a stronger agreement. You know that people are not going to go back and say "Damn, I should have done something." There may be one or two little points down the road. Don't you agree.

“ . . . you do have to recognize that there are going to be disputes and one thing you have to make sure of is you have a fair dispute resolution process because if you lose confidence in the way that disputes are resolved then that leads to the unraveling of agreements and hard feelings. . . . ”

Pelcyger: Yes. And I do believe that we're writing for the ages and we need—one of the things I was conscious of, have been conscious of for a long time, and part of this comes out of looking at past agreements and seeing the terrible flaws in them and hoping to avoid those, but it's very important to try to—there's a tendency to try to resolve issues, paper over them, or . . . and you do have to recognize that there are going to be disputes and one thing you have to make sure of is you have a fair dispute resolution process because if you lose confidence in the way that disputes are resolved then that leads to the unraveling of agreements and hard feelings. Then people say, "Well if you're going to do this, then I'm going to do this," and then it becomes a constant effort to try to find leverage and how you can get back at somebody else and that's not a healthy long term relationship.

“ . . . one of the things that . . . I tried to do is to try to build incentives into the agreement for continuing constructive relationships as opposed to going off in tangents or going off in different directions. . . . ”

But one of the things that I think I tried to do is to try to build incentives into the agreement for continuing constructive relationships as opposed to going off in tangents or going off in different directions. And, one example of that, and I can't remember again, if we talked about this, but probably the best example, one I'm proud of, is that, again, Sierra Pacific has an interest in trying to obtain as much M&I credit water as possible, and they were really focused on these drought periods and how they're going to get through them and how are they going to be able to get enough water, and so they have a tendency to want to, which is a natural tendency,

they're incentivized to obtain as much credit water as possible. And instead of the tribe always necessarily being on the alert to say "No, you can't do that" or "You can't do that," and to limit the amount of credit water and to sort of fight it, instead, we came up with a mechanism so that they can accumulate credit water, and they can continue, for example, during droughts there are no limits on how much credit water they can produce, but at the end of the drought they've got to turn over their excess to the tribe. And so, and if you look at the long term results of the model you see that, I don't know, 80-, 90 percent of the credit water that Sierra Pacific produces as a drought supply, of course you never know when the drought's going to end, you never know how much water you're going to need, and so their tendency is to build in safeguards and to provide more water than they ultimately turn out to need. And so the excess get turned over to the tribe and so at that point the tribe doesn't really have to be so careful, or so suspicious, or so . . . to monitor everything because we think in the long run, you know, we're going to get that water. Whatever water that they get, most of that is going to be turned over—probably *all* of it will because we're talking over/above a certain amount. They'll probably only need 10 or 20 percent of the water that they produce. So those kinds of things really make it easier and better for a long term healthy relationship.

Seney: And while they may not *need* that water, they have the certainty of the supply just in case.

Pelcyger: They have the sense of security which is what the purveyors want. Their worst nightmare is . . .

Seney: Yeah. Right. Exactly. Right. What else was there? Anything else in this fork in the road? Or once you came back with the model rigged up the way everyone agreed to it—it should be, was that the end of it?

“ . . . it was not just a question of getting the model right, as I said, we then had to go through the agreement and make sure the agreement reflected what was proper to do, and it had to do with respecting the tribe's rights to the project water . . . ”

Pelcyger: Well, I can't remember specifically, it's funny how certain things stick and others don't and (Seney: Yes. It is.) (Laughter.) But Ali, Ali's really good. (Seney: Oh yeah. I'm telling you.) It's true. No I think its—it was not just a question of getting the model right, as I said, we then had to go through the agreement and make sure that the agreement reflected what was proper to do, and it had to do with respecting the tribe's rights to the project water and not letting Sierra Pacific, in particular, create their credit water out of our project water.

Seney: I see. Alright. And they were happy with the outcome?

Pelcyger: I think they were ultimately—they ultimately felt like it was reasonable and fair. Yeah.

Seney: What difference has it made that TUMWA has succeeded Sierra Pacific?

Differences Between Dealing with Sierra Pacific and TUMWA

Pelcyger: A lot of difference. And part of it also might be different personalities. At the time of TUMWA succeeding Sierra Pacific, Janet Carson left Sierra Pacific and didn't carry over to TUMWA. So there's different personalities, and . . .

Seney: She was pretty positive personality, wouldn't you say?

Pelcyger: Yes, and she was very decisive, and she was skilled and talented, and we didn't always agree, of course, but we spoke the same language and we had good communication. She was always picking up the phone and communicating well. That's not true now with the management of TUMWA and the people who are there are different.

Seney: But they're still by and large Sierra Pacific Power.

Pelcyger: They came over from Sierra Pacific . . .

Seney: They were just different. You didn't deal with them before?

TUMWA Is a Governmental Entity While Sierra Pacific Was in the Business of Providing Utilities

Pelcyger: Right. And they're also, you know, they're a government entity, and Sierra Pacific, even though the water company was a relatively small component, probably even smaller profits for Sierra Pacific, they cared about it, and I think the reason they cared about it a lot was because they're in the business of providing gas and electricity and basically, ultimately in growth, and they knew that water was important (Seney: Yeah. Right. Exactly. Yeah.) to growth, and so they and they also were a bridge to the business community, for example, in a way that TUMWA isn't, and TUMWA is now much more a government . . .

Seney: Right. You know, by the way, when I interviewed Joe Gremban, I asked him about selling the water part, and his view was "No, you don't do that." For the very reasons that you've outlined, and the point that he made was this is a *key* to everything else we do. To make sure we've got water for development and for building and . . .

Pelcyger: Well, they got into a cash crunch, and at the time we supported the idea of Truckee Meadows entities forming a joint powers entity to take over the water component of the power company as opposed to some foreign company or somebody else coming in who didn't know anything about the Truckee River, didn't know anything about the tribe and would come in and start from scratch. But it has been—it's a different relationship and they haven't been nearly as decisive. They haven't been nearly as . . . entrepreneurial in terms of the joint things to be able to do to improve their interests and to improve ours. They've been much more bureaucratic and much more hesitant. Much less—more difficult to make decisions. We've been negotiating with them over things for seven-, eight years with nothing happening from it.

Seney: Well, I'm aware that, unlike Sierra Pacific *Power* who used to have a block of water rights that they could sell at a reasonable price to developers that TUMWA hasn't done that. As a matter of fact they let Washoe County sell off some rights that ended up in the auction for \$40,000 an acre foot.

Pelcyger: I haven't followed that very closely. I think they still have done it enough to the extent of Sierra Pacific and—again, part of it is that Sierra Pacific basically saw itself as a representative of the development community, (Seney: Right. Right.) and TUMWA doesn't see itself that way. TUMWA sees itself as being a purveyor of water, and it should be up to other people to figure out, you know, how to get a water supply.

Seney: I have been told that there's a lot of unhappiness with TUMWA among the development community. The spark being this business of this water right auction that drove those prices up so considerably and that there is now a move in the legislature that looks like, I'm told it may succeed, to create a Northern Nevada Water Authority that's kind of like the Southern Nevada Water Authority. You must be familiar with that. (Pelcyger: Yeah.) What do you think of that?

Pelcyger: Well, the tribe gave testimony at the hearing before the S-C-R 26, Senate Concurrent Resolution 26 committee that was formed, and the major point that we made is that there needed to be one stop shopping, and that there was such a proliferation of different agencies, all dealing with different segments of the water issue. There was TUMWA and then there is Washoe County and then there's TUMWRF²⁷ dealing with sewage treatment so that, for example, when the tribe was negotiating on the Honey Lake Project recently, "Honey Lake Lite," (Seney: That's what I understand—that's your name for it. Yeah. You've been given credit for that.) And we talked to the developer, but we had concerns about how this imported water, if it was brought in, how it was going to be treated, and we wanted to make sure it didn't get back to the Truckee River, but the developer, Vidler [Water Company of La Jolla, California], said, of the water project, said "Oh, we don't have anything to do with that. You gotta go . . ." They didn't even say, who you gotta go talk to, and then it turns out that nobody knew who to talk to, in Reno, and Washoe County, and TUMWRF and—anyway, so we testified that it made sense, not necessarily for there to be a merger of all of these entities in terms of their different operational responsibilities, but that one entity ought to be in charge of the water infrastructure and the planning function and entities like the tribe that had an interest in this if we could deal with one entity as opposed to three or four or five it would be a lot more efficient and a lot better. So, that the—but we didn't say what it should look like or . . .

Seney: Yeah. But you think TUMWA's days are numbered?

Pelcyger: I don't know. (Seney: As it stands today?) I don't know. I don't know. I don't really understand Nevada politics, but I gather that they—there are a lot of people that feel that way, and (Seney: Yeah. Apparently so.) and apparently have made their views known.

27. See footnote on page 128.

Seney: And they've managed to make a lot of people angry without making anybody happy, which is . . . (Pelcyger: Yeah. Right.) Let me ask you about—unless you say any more about TUMWA and the difference between dealing with them and Sierra Pacific Power. (Pelcyger: OK.) What about this—there are a couple of things hanging the TROA up. One is the Fernley credit water business, and this has to do, apparently there's, I've been told, there's an Indian tribe that is anxious that this be resolved, and Fernley wants the credit water storage, but they don't want to agree to some things you guys want. What's going on there from you point of view?

TROA and Fernley Credit Water Issues

Pelcyger: Well the big issue from the tribe's standpoint is if we put—well this goes back to the issue we were talking about before. Fernley is tremendously overextended with the groundwater, and so they recognize that, at least in part, and they have been acquiring surface water rights from the Truckee River, but they don't have a surface water system yet. They don't have a treatment plant. They don't have—so they've been continuing to pump more and more groundwater, and I think they recognize that they're pumping the groundwater on an unsustainable basis. And they recognize, as does the tribe that they, although they don't have a right to recharge from the Truckee Canal, in fact they've been getting water from the Truckee Canal to recharge the groundwater basin which is very wasteful and inefficient and they don't have any right to it. So, now they come knocking on the TROA door and say, well, we have these water rights from the Truckee Division of the Newlands Project that developers have been turning over to us, and that we haven't been using. We want to use them in the future, and we have plans for a treatment plant, so we want to augment the groundwater system with a surface water right and blend the water. They've got arsenic problems. They got a lot of—enormous number of problems. And they've been growing very rapidly.

Seney: And these arsenic problems are from the groundwater?

Pelcyger: Yes, (Seney: Yeah.) And they think that one of the ways they can deal with is to blend it with the surface water and reduce the gro . . . but they're still going to have to treat the groundwater, the arsenic in the groundwater. So they come knocking on the TROA door and say, well we want to join the TROA club, and we want to be able to store in upstream Truckee River reservoirs these water rights that we've acquired and will be used for municipal use. And so we negotiated with that and we reached terms and conditions of . . .

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From the get go the tribe said “Well, it's one thing to have credit water in upstream Truckee River reservoirs, but how are you going to get that water to your service area?”

Fernley Wanted to Divert Water to its Treatment Plant Through the Truckee Canal Even Though Senator Reid Offered \$10,000,000 of Federal Funding for Treatment

Facilities

And they said, “Well, we’ll divert it to the Truckee Canal.” The tribe said, “No, no, you won’t.” Because from the tribe standpoint the Truckee Canal, first of all is a hundred years old and was built for agricultural purposes at the turn of the century when there was a very different environment both—in all kinds of different ways, legal environment and attitudes about threatened and endangered species and about, at that time it was considered any water that went to Pyramid Lake was wasted. (Seney: Right.) And now we’re in a different situation and particularly with regard to municipal use because municipal water use is—municipalities can certainly afford to pay a lot more for water-related infrastructure than agricultural interests and certainly the common practice is for municipalities who rely on surface water supply to divert their water through a pipeline and avoid the losses of dirt-lined canals or earthen-lined canals. And we negotiated with Fernley for seven years and we came close, but we never reached an agreement, and the 2003 draft TROA, what we decided to do—the only issue that was treated this way was, first of all we put 7H, the provision about Fernley credit water, in TROA, but we had a note that said this hasn’t been agreed to by the negotiators, and then when they did the draft E-I-S for TROA—it was the only issue they treated this way—they did with and without Fernley credit water because there hadn’t been agreement.

“ . . . everybody recognized that the tribe was a mandatory signatory and Fernley wasn’t. . . . and that the tribe had made it clear that the tribe was never going to agree to allow Fernley credit water unless they had an alternate delivery system. . . . ”

And it was—everybody recognized that the tribe was a mandatory signatory and Fernley wasn’t. (Brief aside about turning on the air conditioning.) And Fernley was not a mandatory signatory and that the tribe had made it clear that the tribe was never going to agree to allow Fernley credit water unless they had an alternate delivery system. And Senator Reid said that he would be able to obtain funding—\$10,000,000 worth of funding (Seney: I heard that. Yeah.) to build a pipeline, but only if there was an agreement between the tribe and Fernley. And . . .

Seney: And they wouldn’t go for that.

Fernley Wanted the Seepage Resulting from Use of the Truckee Canal

Pelcyger: They wouldn’t go for that *because* they wanted the seepage. We thought that we could entice them, but they never—ultimately they didn’t go for it, and so we never had an agreement, and so—and then, just about a year or so ago, after Bill Bettenberg retired, the position of the Federal government changed. Prior to that everybody recognized that Fernley would have to make a deal with the tribe and that the tribe was saying that “We’re not going to agree to Fernley credit water unless they had an alternate delivery system and that we would work together to try to get you funding for it.”

TROA Negotiations Are at an Impasse Because the Federal Government and

State of Nevada Have Decided Fernley Credit Water Should Be Included in the Agreement and the City Won't Budge on its Position

And one day we were informed by the Federal government that the Federal government had changed its position and would no longer support the tribe's ability to exclude Fernley. Which *meant*, and Nevada eventually joined in that position as well, so you've got, now, a division among the five mandatory signatories and the tribe and TUMWA, and I think supported by California, were saying "Let's get on with TROA. Fernley has had ample opportunity to negotiate, and they haven't, and the TROA train is leaving the station. We're not going to wait for Fernley." (Seney: Right.) And it appears that Nevada and the United States are saying "We won't sign TROA unless the tribe agrees to allow Fernley credit water to be included." So we have an impasse.

Seney: My understanding is that Betsy Rieke went back to Washington to try to iron this out and ended up with the Feds changing their position to what you describe now. Is that right?

Betsy Rieke Replaces Bill Bettenberg as the Lead in TROA Negotiations and How the Process Changed as a Result

Pelcyger: She went back to Washington on several occasions and came back with different positions at different times, and she—at times I think she went back to obtain clarification because I think she felt when she inherited the position from Bill Bettenberg that the policy people and political people in Washington weren't knowledgeable about certain things, and she wanted to make sure, having been in Washington, that they were informed and felt that was her responsibility. Other times she went back to try to convince them about ways that this could be resolved and came back with her position not being endorsed. It's been a—and it's been very unfortunate from our standpoint because, these people in Washington, we've never talked to—the tribe hasn't talked to. TUMWA hasn't talked to. California hasn't talked to.

“... the miracle of TROA is that it's an extraordinarily ambitious undertaking that requires five to tango, and that five parties have reached agreement on this *huge* . . . very *painful* slow process, but with mutual respect and . . . we found a way to overcome those differences. . . .”

And the miracle of TROA is that it's an extraordinarily ambitious undertaking that requires five to tango, and that five parties have reached agreement on this *huge*—and they're probably fifty issues on every page (Seney: Right.) that we grappled with and come to, ultimately in a *very painful* slow process, but with mutual respect and with all—no question but that all five signatories want to reach an agreement—we found a way to overcome those differences. *Never once* during that process did anybody go back to Washington on their own to get marching orders and come back and announce to the rest of us what the position was. And now, all of a sudden, this is what we were confronted with. And . . .

Seney: Bill Bettenberg wouldn't have handled that way would he, do you think?

Pelcyger: I don't think so. No. But Bettenberg, you know, some people were also critical of the way that Bill Bettenberg would have handled it. But it was certainly *not* the process that had been utilized in TROA. And *we're very concerned*, I mean for example, one of the proposals is, they say to the tribe "Well tribe, why don't you include Newlands Project credit water in TROA and you can fight about the Truckee Canal later." Well, we pointed out that you can't do that because there's a provision—there's a provision in TROA, but not just in TROA, but in the Settlement Act, that says that basically binds all the parties that once they sign TROA that they cannot do anything that would interfere with the rights of any other party under TROA—under operations that are authorized under TROA. And so if Fernley had credit water under TROA and we said you can't use the Truckee Canal, we would be in violation of the agreement. And we'd be in violation of the statute. So . . .

Seney: So you'd better hang tough on this.

In Order to Meet its Goals, the Tribe Needs to Avoid Having Fernley Dependent upon the Truckee Canal

Pelcyger: We *have* to hang tough on this. And from the tribe's standpoint, as I think you know, it's all about the Truckee Canal. (Seney: Yes, I *do* know that.) And the mayor of Fernley was quoted in the paper as saying "We, Fernley," it was funny because Churchill County, this is another area where we had some common interests, both the tribe and Churchill County, had protested some Fernley water right transfers, and the mayor of Fernley was quoted in the paper as saying "Churchill County shouldn't be opposing us. Why Churchill County should recognize that we're the key to keeping the Truckee Canal open. Without us the only chance they have to keep the Truckee Canal open is if 20,000 people in Fernley become dependent on the water from the Truckee Canal. And so they should be supporting us because we're the only ones who can hold back the tribe." So Fernley made very clear where—and if the tribe's goal, which it is, is to close the Truckee Canal, we can't have Fernley being dependent (Seney: Right.) on it.

Seney: Right. Exactly. They've made that very clear haven't they. (Pelcyger: Yeah.) Inadvertently probably. Unwisely. Yeah. You're sort of nodding yes and agreeing, but the tape won't see that.

Some People Think the Tribe Is Going to Abandon its Pursuit of Water in Order to Free up the \$70,000,000 That Becomes Available to it When TROA Goes into Effect

Pelcyger: Yeah. (chuckle) I should know that. Let the record show he nodded his head. (Seney: Exactly right.) But, no, so from the tribe's standpoint TROA is the only opportunity they'll ever have to correct a hundred and fifty years of tragic mistakes, and I think some people feel that, you know, the \$70,000,000 sitting in the treasury over there and that the tribe is going—and TROA becoming effective is a condition precedent to the tribe getting that money, and so the tribe doesn't really care about

the water and because the money will entice them and they'll say the hell with the water. But the tribal council has been steadfast, and they're saying "Look the money is just the icing on the cake. What's important to us is the water. We're not going to get another opportunity. It's not like there's going to be another (Seney: Right.) chance. If we give up now on Fernley that's it."

Seney: And, as you were telling me before we started recording, at dinner, there's all kinds of possibilities have opened up for the tribe with ethanol and the use of switch grass, and . . .

Pelcyger: Solar and wind and geothermal.

Seney: So that 70,000,000 doesn't look nearly as important as . . .

Pelcyger: Well, it's a big pot of money . . . (Seney: But it's not the only pot.) But the tribe, that's not what's moving the tribe. The tribe before all these things came along was steadfast.

Seney: Right. No, I'm not saying it's—to those who say there's 70,000,000 sitting there, they're going to want that money no matter what, the fact is that the circumstances are not what they were. And that 70,000,000, attractive as it may be, is not really essential. Because you've said that Senator Reid supplied you with some money to work out the sheet grass business, (Pelcyger: Switch grass.) switch, I'm sorry, was clearly independent of that 70,000,000 that's been . . .

Pelcyger: Oh, yeah, he's been a champion of the tribe, and he hasn't put strings on it or he hasn't ever attempted to say, "Well, I'll do this if you'll . . ."

Seney: Right. Right. Right. That's interesting. Well, I can certainly, you know, I understand how adamant the tribe is about wanting to get rid of the canal, and I can understand why, and . . .

Pelcyger: Well the canal is a relic, *especially* when it comes—see, this is what people don't understand, as well. As I said, the total amount of water that has been diverted through the Truckee Canal has been reduced by, say, from 240,000 acre feet average down to 60,000 acre feet. (Seney: Right.) And what that means is that, Ali figured this out a year or so ago, that water is being diverted to Lahontan Reservoir only 30 percent of the months over a one hundred year period. 30 percent. 70 percent of the time there's not water to Lahontan Reservoir. Eventually, everybody agrees, in a pretty short period of time Fernley's going to be all municipal. There's not going to be any agricultural [water]. And so that means that the only water that's going to be transported in the Truckee Canal 70 percent of the time is going to be for Fernley, and we're working to make that 80 percent or 90 percent or . . . because we have all of these, the upper Carson is one example where we want to keep ratcheting down on the amount of Truckee River water that goes to Lahontan Reservoir. (Seney: Right, right.) So Fernley is the key, and if Fernley becomes dependent on the Truckee Canal, the Truckee Canal stays forever. (Seney: Right. Right. And it opens up the possibility *in the future* that there might be pressure to put even *more* water through

the canal.) That's true too, yeah.

Seney: What is the situation with the credit water for T-C-I-D?

Pelcyger: There is none. Well, I'm sorry, there is Newlands Project credit water. I think that's what you're referring to? (Seney: Right, I'm sorry {unclear}) Well, we talked about that today, in fact. That was another situation where the Federal government changed its mind.

Seney: Just recently?

Pelcyger: Within the last year. That one, I think (Seney: Was this also Betsy Rieke raising these issues?) . . . actually this one arose while Bill Bettenberg was still there. And Bill retreated from commitments he had previously made—at the detriment of the tribe.

Seney: This is what you alluded to when you said “sometimes people objected to the . . .”

Bill Bettenberg Was Very Good at Working with the Negotiating Parties but May Not Have Kept People in Washington Informed Enough

Pelcyger: Well, I wasn't alluding to that specifically, but I think Betsy's, I don't want to put words in her mouth, but I . . . at least there's been criticism of Bill that he didn't keep people in Washington informed enough and that he was too much of a “lone ranger” and that he worked very well with the representatives, I mean he was very good at working with representatives from Reclamation and Fish and Wildlife Service and BIA and the Justice Department and forging a Federal team position sort of out in the field. But he, when it came to dealing with the Washington end of things, he didn't because, I think, for a lot of reasons probably. One of which was because it's very difficult to convey to people in Washington the complexity and the difficulty of the issues, and *he knew* also this was not a situation where Washington, unlike most everything else where Washington was the final word on the subject, because under the TROA legislation it takes five to tango.

“ . . . he devoted his efforts to trying to develop a cohesive Federal position with the agencies who were on the ground and knew most about it and dealing with the other four entities. . . .”

And so he devoted his efforts to trying to develop a cohesive Federal position with the agencies who were on the ground and knew most about it and dealing with the other four entities. And that worked, but that was a void there . . .

Seney: Well, sometimes ignorance is bliss.

Newlands Project Credit Water

Pelcyger: Right, but, anyway, so I think it's a situation—the Newlands Project credit water we're working on that now. We'll talk about that tomorrow at the meeting. We feel like

we've made some progress and then we take a step back and its—but it seems to be that we're closer on that than we are on Fernley. And so less intractable position issue. And there are solutions at least that are in sight.

Seney: What are the issues with the Newlands Project part of the water? How much water we talking about?

Pelcyger: Well, that's hard to say. But, again, this is—it's *key* to the tribe. This is what Newlands Project credit water—have we talked about the concept of Newlands Project credit water?

Seney: I'm not sure we have.

“ . . . start out with the fundamental principle that the Carson River is the principal source of water for the Carson Division of the project. . . . And the Truckee River is a supplemental source. . . . ”

Pelcyger: Okay. Alright. Well, start out with the fundamental principle that the Carson River is the principal source of water for the Carson Division of the project. Because Lahontan Reservoir is on the Carson River; *all* of the Carson Division is below Lahontan Reservoir; and *all* the water from the Carson River is captured in Lahontan Reservoir except when it spills. And the Truckee River is a supplemental source.

“So the Truckee River is . . . a supplemental source that only diverts water to Lahontan Reservoir when there is an insufficient amount of Carson River water. But there are issues of how you juggle that, and OCAP basically sets storage targets at the end of every month ;. . . ”

So the Truckee River is allowed, under OCAP, it wasn't always this way, but has now been recognized that it's a supplemental source. It only diverts water to Lahontan Reservoir when there is an insufficient amount of Carson River water. But there are issues of how you juggle that, and OCAP basically ~~says~~ sets storage targets at the end of every month and tells you that if the storage target at the end of this month after everything, you have the evaporation and the releases and the inflow from the Carson, if there's not enough water to meet these end of month storage targets then you can take Truckee River water over to make up the difference. But here you are in November, December, January, the early parts of the winter and even into February, March, and you don't know how much water you're going to get from the Carson River. I mean, you have projections, but they change and the storm patterns change, and everything else. In the meantime, they're allowed to divert Truckee River water to Lahontan. Well then, what happens like a year like these last two years when you have a tremendous runoff from the Carson River and all that water that you took over from the Truckee wasn't necessary to keep the . . . and the key period is the end of June because that's the end of the spring runoff.

“ . . . the idea of Newlands Project credit water is that . . . you don't take that water . . . Instead, you store it on the Truckee River side, and *then* at the end of June, when you see how much water the Carson River has produced . . . [you

determine] how much of that Truckee River water that's stored up here do you need to take over to Lahontan . . . in the meantime, you avoid the spills, and you avoid the evaporation, and you avoid diverting Truckee River water unnecessarily. . . ."

And so the idea of Newlands Project credit water is that through various mechanisms you don't *take* that water in November, December, January, February, over to Lahontan Reservoir. *Instead*, you *store* it on the Truckee River side, and *then* at the end of June, when you *see* how much water the Carson River has produced, you look and see—okay, were they able to meet the end of June storage target without that Truckee River water, and if not how much of that Truckee River water that's stored up here do you need to take over to Lahontan to make up that water supply. But in the meantime, you avoid the spills, and you avoid the evaporation, and you avoid diverting Truckee River water unnecessarily.

". . . it's another key tool in order to eliminate diversions from the Truckee River to Lahontan Reservoir. . . . one of the principles of OCAP is that the purpose . . . is to *maximize* the use of Carson River water in the Newlands Project, *minimize* the diversion from the Truckee in order to make as much inflow to Pyramid Lake from the Truckee River as possible. . . ."

So it's another, just like Fernley, it's another *key* tool in order to eliminate diversions from the Truckee River to Lahontan Reservoir. And so one of the principles of OCAP is that the purpose of the regulations is to *maximize* the use of Carson River water in the Newlands Project, *minimize* the diversions from the Truckee in order to make as much inflow to Pyramid Lake from the Truckee River as possible. And the Newlands Project credit water is the vehicle to do that.

". . . TROA is *important* because TROA allows you to do that in ways you couldn't do it before because you can modify the Floristan Rates and hold it back. . . ."

And TROA is *important* because TROA allows you to do that in ways you couldn't do it before because you can quote modify the Floristan Rates [unquote] (Seney: Right.) and hold it back. And so that's what Newlands Project credit water is about, and the dispute that we're having is how secure is this Newlands Project credit water. There's a relationship between the Newlands Project credit water and TROA and the OCAP.

"The important difference between the OCAP and TROA is that OCAP is subject to the unilateral authority that's just a Federal regulation that can be changed by the Federal government . . . whereas TROA is as close to permanent as you can get, and it can only be changed if you go to the court and get the consent of the five signatories. . . ."

The important difference between the OCAP and TROA is that OCAP is subject to the unilateral authority that's just a Federal regulation. It can be changed by the Federal government—has been changed many times by the Federal government

whereas TROA is as close to permanent as you can get, and it can only be changed if you go to the court and get the consent of the five signatories. So, the tribe's position is that we want the Newlands Project credit water provision in TROA to be secure, and to be as secure as everybody else's credit water in TROA and the Federal position is—"No," that now the Federal position, which is not always this way, and our position has changed, too, to be fair, that they want Newlands Project credit water and TROA to be dependent on certain provisions in OCAP which can be unilaterally changed by the Federal government and which would have the effect of negating the Newlands Project credit water. So that's what we're trying to . . .

Seney: Ahh, you want it in the TROA so it can't be manipulated by . . .

Pelcyger: We want it to be as self contained as possible in TROA. We recognize that, for example, it's not going to be a 100 percent foolproof because these storage targets that I've mentioned, *that's* a matter for OCAP, and it's not in TROA. And if the Federal government changes the storage targets that's going to affect Newlands Project credit water. We accept that. But we don't want them to be able to change the OCAP in a way that says that you don't make a determination at the end of June how much water . . . the idea is at the end of June you decide how much of that water is necessary and *the rest becomes fish water*—what's not necessary, mostly fish water. There are some other incidental reclassifications that occur as well. But we basically don't want them to be able to *nullify* the Newlands Project credit water provisions in TROA by unilateral changes in OCAP, and we say nobody else's credit water is subject to that vulnerability.

Seney: Interesting.

Settlement Act

Pelcyger: We also say that under the Settlement Act—the Settlement Act doesn't quite say this, but what everybody agrees that it means is that TROA shall be the exclusive regulations governing the operation of Truckee River Reservoir. So we want it to be in TROA (sound of tapping on table)—certain provisions be in TROA—not in OCAP. Which is the change in our position. Because at one point, before the Federal government turned, we thought it would be better having more control of the Federal government because they were more likely to take our side. (Laughter) We learned that that can change.

Seney: Yeah. That's fascinating.

Pelcyger: But that's, as I say, a closer to a solution than . . .

Seney: Than this Fernley.

Pelcyger: Than the Fernley position.

Seney: There was some talk about spinning the Fernley business off and settling it separately, but obviously you don't want that from what you've said.

Pelcyger: What do you mean settling it separately?

Seney: Signing TROA and then coming to grips with the Fernley.

Pelcyger: Well, that would be fine with us. We don't want it to be included in TROA. From the tribe's standpoint . . .

Seney: But you'd take the whole thing out of TROA for the moment.

Pelcyger: Well, we proposed that you could keep it in TROA because we've agreed upon what the language should be. We just haven't agreed about the means of conveyance, but that that provision wouldn't take effect until there was an agreement on other things. We agreed to do it . . .

Seney: Now, I was told you were actually working on language on that. Has that faltered or are you still . . .

Pelcyger: We did propose some language which was rejected by Nevada.

Seney: You still working on it or looking for another way.

Pelcyger: Well, we're supposed to be working on it, but, as far as I know, nothing has been happening. We've been engaged in much more dialogue over the Newlands Project credit water.

Seney: Yeah. Ok. That's great, as always, Bob. Anything else you want to add?

Pelcyger: I don't think so. I can't think of anything right now.

Seney: That wonderful smile. I wish you'd tell me what that means, you know.

Pelcyger: I enjoy talking to you. . . I do enjoy our conversations. It make me, you know, it's an opportunity to think back and you ordinarily you're focused on the problems that are immediately in front of you, and you realize you've been through a lot and accomplished a lot, and . . .

Seney: Maybe I should charge you as well as the Bureau.

Pelcyger: Yeah. Be a therapist.

Seney: (Laughs) Well, thanks again, Bob, I really appreciate it.

Pelcyger: Well, is this going to be--well you can turn it off . . .

END SIDE 2, TAPE 2. AUGUST 9, 2006.
END OF INTERVIEWS.